Supreme Court, U.S.
FILED
FEB 16 2010
OFFICE OF THE CLERK

NO. 09-983

IN THE
SUPREME COURT OF THE UNITED STATES

KEVIN SCOTT PETERSON
Petitioner

V.

THE CITY OF FORT WORTH, TEXAS
Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Under 42 U.S.C. § 1983:

What constitutes a "pattern" of condoning clearly excessive force by officers that would create a custom or policy by which a City is liable?

What is the standard by which to evaluate ratification by a City of an officer's excessive use of force?

Does a pattern of condoning clearly excessive force after investigation create municipal liability for lack of supervision?

Does a training program which fails to train a city's officers regarding the specific force used or the consequences of such use of force make it obvious to the policymaker that the risk of injury is a plainly obvious consequence of the failure to train?

Does an ongoing pattern of excessive force by officers in and of itself make it obvious to the policymaker that the risk of injury is a plainly obvious consequence of the failure to train?

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The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. Vol. 1, A) is published at 588 F.3d 838. The district court's opinion (Pet. App. Vol. II, WW) is not published and can be found at 2008 WL 440301 (N.D.Tex. 2008).

JURISDICTION

The judgment of the court of appeals was entered on Nov. 17, 2009. (Pet. App. Vol. 1, A). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress

applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Kevin and Jody Peterson went out one night to a friend's birthday party in the Fort Worth Stockyards area. After drinking at the party, they decided it would be better not to drive home until morning. They decided to remain in the Billy Bob's Texas parking lot where many of the rodeo cowboys parked and frequently spent the night in their trailers and trucks. Jody got in the front seat and Kevin got in the back seat where they both went to sleep, fully clothed. The first thing Mr. Peterson remembers is being dragged out of the truck by his clothes, then hitting the ground on his back with two people wrestling him to the ground, rolling him over and handcuffing his hands behind his back. Then Mr. Peterson was picked up by the handcuff chain, spun around and pinned against the bed of the truck. One person was yelling in Mr. Peterson's ear and then struck him in his thigh with a hard knee strike. It was the Fort Worth police, Officers Ballard and Horner. After being questioned by the officers, the Petersons were not arrested but released and allowed to return to sleep in their vehicle. Mr. Peterson experienced increasing pain in his thigh where he had been struck and later that morning went to the emergency room, where he was immediately admitted. At the hospital, it was determined that the officer's knee strike had ruptured Mr. Peterson's femoral artery. He

underwent two surgeries to repair the ruptured artery and remained in the hospital for almost two weeks.

The Fifth Circuit Court of Appeals found that there was sufficient evidence to establish excessive use of force by Officer Ballard in this case. However, the court denied liability as against the City of Fort Worth.

The parties agreed that the police chief, Chief Mendoza, was the designated policymaker for the City of Fort Worth in this case. Chief Mendoza stated that if there is no discipline for excessive force, it could be construed as tacit approval of the use of force.

City of Fort Worth Police Department General Order 306.09 requires "any use of force incident during which the level of force used was hard open-hand control and restraint or greater shall be reported and identified as 'Use of Force by an Officer.'" The General Order specifically directs an officer to "report the full details of the use of force in related arrests or offense reports. If no arrest or offense report is to be completed, the details shall be reported in an incident report."

At the time of completing the Use of Force report, "[a] separate inter-office correspondence will be completed by the supervisor and forwarded through the officer's chain of command to be reviewed and filed by the bureau." These reports are supposed to be completed at the end of an officer's

watch and are to be entitled "Use of Force" and routed to the captain for management review. The captains are charged with reviewing the Use of Force reports "to determine if there is a need for *changes* in departmental procedures or *additional training* for the officer." (emphasis added).

Although the City of Fort Worth requires officers to complete a Use of Force report in each case where force is used during a citizen encounter, there was no such report filled out in this case. Officer Ballard denied even using a knee strike. However, Officer Horner admitted that Ballard did use a knee strike and that, even so, neither of them filled out a Use of Force report. Even though there was no Use of Force report, there was a citizen complaint and, subsequently, an internal affairs investigation. The investigation revealed that Ballard lied about using a knee strike; that Ballard did not even believe a knee strike was justified under the circumstances because Peterson was not a threat and not engaged in behavior that justified a knee strike; that a knee strike would be excessive, that the information from the officers was conflicting; that they violated policies by not filling out a Use of Force report; and that Horner falsified her report about the scene. Despite these problems, the entire Chain of Command found the excessive force complaint to be "not sustained" and the policymaker, Chief Mendoza, found that the officers acted in compliance with city policies and procedures. Thus, there was no discipline for any use of force and neither officer was disciplined for failing to fill out a Use of Force report

or otherwise reporting a use of force against Mr. Peterson.

Petitioners did not provide information on the number of Use of Force reports filed or on each citizen complaint filed. However, Petitioner did obtain and provide information reflecting many instances where an investigation of use of force by Fort Worth police was conducted and the complaint was not sustained or unfounded. These occurred even in circumstances where the use of force was clearly excessive and clearly violated the citizen's constitutional rights. They include, but are not limited to, a prior instance where a knee strike causing serious injury was used on an innocent citizen who merely tensed up while being handcuffed (even though it turned out he was the victim and not the criminal). They include a situation where the officers entered an apartment admittedly with no reasonable suspicion and no probable cause and tased a man hiding in a closet until he was unconscious and not breathing. Chief Mendoza testified that even though the officers had no reasonable suspicion of a crime and no probable cause to enter the apartment, they could justifiably use such force against a citizen. Out of 27 instances of clearly excessive force, the city condoned the excessive force on 23 of them (85%) by sustaining the complaint on only four occasions and then the city provided only minimal discipline.

With respect to training on use of force, Officer Horner could not recall receiving any training on recognizing when the force that was utilized was

adequate for the circumstances versus excessive. Officer Ballard did not recall his training, if any, regarding the difference between passive and active resistance in relation to the amount of force that may be used. Chief Mendoza testified that he has the overall authority to do the training, approving the training policies of the department. The Chief agrees that an officer is less likely to hit somebody in a place that will cause more serious damage if they understand the ramifications of doing so. The Chief further explained that the additional training that takes place subsequent to the academy does not address the use of knee strikes. Officer Ballard conceded that there's no way for an officer to evaluate the risk of injury from the use of force if there is no training in that regard. He does not recall being told that there was any risk of injury from a knee strike. It would make a difference to him in deciding which distraction technique to use to know which might cause injury, but the City never taught him about that. Officer Ballard was written up on one occasion for tasing a handcuffed suspect but never told why it was dangerous to do so. He was not subsequently retrained on the use of tasers. In fact, he is not sorry that he did it and neither is the "academy staff" who approves of what he did. Officer Ballard himself indicates that if he had appropriate training indicating the possible ramifications of using a knee strike, that it would make a difference in his evaluation of his use of force.

Chief Mendoza stated that he was the overall authority for training and approving training policies of the department. He acknowledged that an officer

is less likely to hit a person in a place that will cause more damage if they understand the reasons for doing so and he conceded that the type of injury Peterson received could result from a knee strike. He further acknowledged that the continuing education/training offered to his officers does not include training on knee strikes or the consequences of using knee strikes.

This case was filed in state court and removed to federal district court for the Northern District of Texas based upon federal question jurisdiction pursuant to 28 U.S.C. § 1446.

ARGUMENT

A. Pattern

There are two reasons for reviewing the issue of what constitutes a pattern of clearly excessive force to establish liability under 42 U.S.C. § 1983. First, the decision of the Fifth Circuit Court of Appeals conflicts with decisions by the Ninth Circuit Court of Appeals and the Third Circuit Court of Appeals. Secondly, the Fifth Circuit Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court.

In this case, Peterson did not present all of the Use of Force reports or all of the citizen complaints of force. Rather, Peterson presented 27 instances where the officers had used force in situations involving minor crimes and where, in most instances

(85%), clearly excessive force was exonerated by the chain of command. The Fifth Circuit held that "[a] pattern requires similarity and specificity; '[p]rior indications cannot simply be for any and all 'bad' or unwise acts, but rather must point to the specific violation in question." citing Estate of Davis ex rel. McCully v. City of North Richland Hills, 406 F.3d 375, 383 (5th Cir. 2005). "A pattern also requires 'sufficiently numerous prior incidents,' as opposed to 'isolated instances.'" citing McConney v. City of Houston, 863 F.2d 1180, 1184 (5th Cir. 1989). The court determined that 27 instances of complaints of excessive force did not establish a pattern. App. Vol. I, U-V.

1. Conflict in Circuits

In Larez v. City of Los Angeles, 946 F.2d 630, 647 (9th Cir. 1991), the Ninth Circuit held that evidence of inappropriate investigations of citizen complaints and lack of discipline "supported the [P's] theory that the LAPD's disciplinary and complaint processes, executed by policy or custom, contributed to the police excesses complained of because the procedures made clear to the officers that, at least in the absence of independent, third-party witnesses, they could get away with anything....Aside from these allegedly flawed procedures, there was evidence of a departmental policy or custom of resorting to the use of excessive force. The jury could properly find such policy or custom from the failure of [the police chief] to take any remedial steps after the violations. [The police chief's] statements, coming from a final policymaker on police matters,

could have been considered to represent the LAPD's policy or custom of condonation of, and acquiescence in, the use of excessive force by its officers." The Larez court makes no mention of the types of offenses connected to the other complaints or the number of complaints that were reviewed. The determination that the chief's statements could be considered to represent policy is in direct conflict with the circuit court decision in the present case where the policymaker's statements concerning excessive force were dismissed as "his opinion."

In Bielevicz v. Dubinon, 915 F.2d 845 (3rd Cir. 1990), the Third Circuit addresses uncorrected use of force without reference to specificity or numerosity:

> [T]o sustain a § 1983 action against the City, plaintiffs must simply establish a municipal custom coupled with causation — i.e., that policymakers were aware of similar unlawful conduct in the past, but failed to take precautions against future violations, and that this failure, at least in part, led to their injury. If the City is shown to have tolerated known misconduct by police officers, the issue whether the City's inaction contributed to the individual officers' decision to arrest the plaintiffs unlawfully in this instance is a question of fact for the jury. The Fourth Circuit, in Spell v. McDaniel, 824 F.2d 1380 (4th Cir. 1987), cert. denied sub nom. City of Fayetteville v. Spell, 484 U.S. 1027, 108 S.Ct. 752, 98 L.Ed.2d 765 (1988), clearly articulated this theory of proximate causation: "A

> sufficiently close causal link between . . . a known but uncorrected custom or usage and a specific violation is established if occurrence of the specific violation was made reasonably probable by permitted continuation of the custom." 824 F.2d at 1391. We endorse this formulation....Indeed, it is logical to assume that continued official tolerance of repeated misconduct facilitates similar unlawful actions in the future. The Supreme Court, in Brandon v. Holt, 469 U.S. 464, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985), endorsed this proposition.

There are cases out of the First Circuit, Second Circuit, Seventh Circuit and Eighth Circuit that also find a custom without demanding a specific number of previous occurrences or identical nature of infraction: Baron v. Suffolk County Sheriff's Dept., 402 F.3d 225 (1st Cir. 2005) (one instance of conduct sufficient as there was evidence from which to infer that it was a longstanding practice); Gentile v. County of Suffolk, 926 F.2d 142 (2d Cir. 1991) (there was a "custom" of malicious prosecution established by report concluding that District Attorney's office and police department had failed to investigate or discipline employee misconduct generally and there was a "lack of oversight in several different areas of criminal law" but no requirement of identity of infractions or a specific number of instances); Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1988) (found that custom of keeping "street files" was long standing, with no discussion of number of instances, length of time or similarity of crimes being investigated); Ware v. Jackson County, Mo., 150 F.3d

873 (8th Cir. 1998) (in referring to the fact that there were approximately seven to ten prior complaints over a seven year period of sexual abuse of inmates, and that they processed approximately 8,000 inmates annually, the court stated "[n]or does the number of mishandled complaints compared to the number of inmates undermine our conclusion where the record is replete with evidence of repeated sexual misconduct on the part of JCDC personnel").

Under the standards enumerated in these cases, the Peterson court would have considered the inappropriate investigations, the lack of discipline of the officers, the failure of any remedial steps (including no remedial training) and the chief's statement that his officers could use force even in situations where it was unconstitutional. None of the cited opinions mention any requirement of specificity regarding prior instances of excessive force or "numerous" prior incidents. These are clearly vastly different standards as applied to determining whether a pattern of conduct has been established.

Does the prior conduct have to be exactly the same? Even if officers had engaged in instances of excessive force by arm bar take downs, will those apply to a consideration of a subsequent use of excessive force by a knee strike or a taser? According to the Fifth Circuit, no. According to the First, Second, Fourth, Sixth, Seventh and Eighth, yes. There is direct conflict as to what the standard is to determine a pattern.

2. Unsettled Area of Law

There is certainly confusion amongst the circuits as to what it takes to establish a custom or policy based upon a pattern of conduct. This Court has never determined that there is a requirement for a specific number of prior instances relating to establishing a pattern. This Court has never held that the prior conduct establishing a pattern must be identical to the conduct that violated the complainant's rights. What are the parameters for determining the similarity of the conduct in question? How many instances of constitutional violations will be tolerated before it becomes an intolerable custom?

Additionally, there is confusion as to the weight to give to the opinions and statements of the policymaker, in this case, Chief Mendoza. Chief Mendoza stated a police officer may legally use force even if a police officer does not have a legal right to enter a private residence and make an arrest. The majority dismissed his statement as "his opinion." However, the dissent, as well as the decisions of other circuits such as in Larez, supra, consider such statements as evidence of policy. The type of evidence to be evinced from the policymaker is something that also needs clarification.

B. Failure to Train/Supervise

There are two reasons for reviewing the issue of what constitutes a failure to train and/or supervise to establish liability under 42 U.S.C. § 1983. First,

the decision of the Fifth Circuit Court of Appeals conflicts with relevant decisions of this Court. Second, it conflicts with decisions by numerous other circuit courts.

In this case, the majority held that "[p]articularly in the absence of evidence that the use of knee strikes had caused serious injuries on previous occasions, Peterson has presented no material fact question to show that it should have been *obvious* to the policymakers that the risk of serious injury was a 'highly predictable consequence' of the failure to train. *See* Estate of Davis ex rel. McCully v. City of North Richland Hills, 406 F.3d 375, 383, 386 (5th Cir. 2005)(deliberate indifference usually requires 'at least a pattern of similar incidents in which the citizens were injured' (citation omitted), and 'narrow' single incident exception has applied when the court finds a complete failure to train, not just a failure to train in 'one limited area')." App. Vol. 1, R.S.

1. Conflict with this Court

In City of Canton v. Harris, 489 U.S. 378, 389—90, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989), it was determined that municipal liability for failure to train could be shown in two ways: First, a municipality shows deliberate indifference when it fails to train its employees to handle a recurring situation that presents an obvious potential for a constitutional violation and this failure to train results in a constitutional violation. Second, a municipality shows deliberate indifference if it fails

to provide further training after learning of a pattern of constitutional violations.

The majority in the present case combined the two prongs set out by this Court and created a hybrid that requires a higher standard for a failure to train claim. Instead of analyzing whether Mr. Peterson had presented evidence that either there was a failure to train for situations that present an obvious potential for constitutional violation or a failure to train after learning of repeated violations, the court required both types of evidence—that there was an obvious risk of injury from that specific conduct and a pattern of similar incidents causing injury.

Using the "or" standard promulgated by this Court would have allowed the court to analyze whether 1) there was an obvious risk of injury from failing to train on appropriate use of knee strikes and/or the consequences of using a knee strike or 2) the city failed to provide appropriate training after learning of repeated complaints of constitutional violations involving the use of excessive force in cases of minor infractions.

For instance, there was a prior instance where a knee strike was used by a Fort Worth police officer, causing serious injury, on a citizen who had been ordered to the ground and merely tensed up while being roughly handcuffed. The citizen turned out to be the owner of the place being burglarized and not the criminal. He was not resisting or trying to flee and the force used—the same type of knee strike that was used on Kevin Peterson—was clearly excessive.

This was one of twenty-seven incidents of citizen complaints of excessive force for minor crimes. The officers were admittedly not taught the physical consequences of using force on citizens—the potential harm. Due to the serious injuries sustained as a result of the clearly excessive force by the officers on a repeated basis, the need for additional training should have been obvious. The officer who knee struck Kevin Peterson admitted that had he known the consequences of a knee strike, it would affect his decision of what level of force to use.

One of the infractions of the officers involved was the failure to provide a Use of Force report. The reasons for requiring a Use of Force report include using it to determine if there is need for a change in practice or additional training. Thus, the city acknowledges that knowing how officers use force will provide information about the need for more training. Yet, even after admitting to the failure to provide a Use of Force report, the officers were not disciplined in any manner. While this specific incident is not causally related to the injury to Mr. Peterson since it was subsequent to his injury, it is evidence that such misconduct is accepted and that the failure to report use of force is condoned. As stated by the dissent in the present case, "[t]his, in turn, ensures there will *never* be an assessment of whether training on excessive force should be conducted with greater regularity or in a different manner." App. Vol. I, EE. This is direct evidence of deliberate indifference.

Additionally, the appellate court in the present case departed from this Court's precedent in determining that the "similarity" of the incidents constituting a "pattern" must be nearly identical. While the appellate court does not use the term "nearly identical," that is the result of its holding. The prior incidents of excessive force in this case did not all involve knee strikes, but they did involve use of excessive force in situations involving minor infractions. This should have created an obvious need for additional training of the officers on using force in situations involving minor infractions and/or for "compliance."

2. Conflict with Other Circuits

The appellate courts of other federal circuits follow the "either/or" approach of the Harris case without the "narrow exception" doctrine of the Fifth Circuit.

The appellate court in the present case assesses the "predictability" of a constitutional violation in the context of a failure to train in a manner that is different from other circuits. In the present case, the Fifth Circuit finds that there must be evidence that the violation had occurred previously in order to make it "obvious" that it might happen in the future absent training or that there must be a "complete failure to train." However, other circuits have determined that prior violations are not necessary to establish a claim: Young v. City of Providence, 404 F.3d 4, 28, 29 (1st Cir. 2005) (a jury could find an obvious risk of injury despite no

evidence of a prior incident); A.M. v Luzerne County Juvenile Detention Center, 372 F.3d 572, 583 (3rd Cir. 2004) (no evidence of incidents involving other residents than the claimant and no "complete" failure to train); Flores v. Morgan Hill Unified School District, 324 F.3d 1130, 1136 (9th Cir. 2003) (finding discrimination against gays predictable from lack of training for school administrators about sexual orientation discrimination); Gregory v. City of Louisville, 444 F.3d 725 (6th Cir. 2006) (city's failure to provide training on key duties with constitutional impact on rights of citizens supports a claim for failure to train).

C. Ratification

There are two reasons for reviewing the issue of what constitutes ratification to establish liability under 42 U.S.C. § 1983. First, the decision of the Fifth Circuit Court of Appeals conflicts with decisions by the Sixth Circuit Court of Appeals. Second, the Fifth Circuit Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court.

In this case, the majority acknowledges that City of St. Louis v. Praprotnik, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988), stands for the proposition that "[i]f the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final." However, the Peterson decision goes on to limit the

application of Praprotnik: "[b]ut our precedent has limited the theory of ratification to 'extreme factual situations." See Snyder v. Trepagnier, 142 F.3d 791, 798 (5th Cir. 1998). Under that precedent, we cannot say that this case presents an extreme factual situation. " App. I, R-S.

1. Conflict in Circuits

In Leach v. Shelby County Sheriff, 891 F.2d 1241 (6th cir. 1989), the Sixth Circuit found that "[f]urther evidence of a policy of deliberate indifference is found in the Sheriff's failure to investigate this incident and punish the responsible parties. It was the same type of 'ratification of the illegal acts' that the Sixth Circuit found to be a sufficient 'official policy' of the county and sheriff in Marchese v. Lucas, 758 F.2d 181, 188 (6th Cir. 1985), cert. denied, 480 U.S. 916, 107 S.Ct. 1369, 94 L.Ed.2d 685 (1987)."

Following the requirements of Praprotnik, Mr. Peterson has provided evidence of a policymaker that approved of the subordinate's conduct and the basis for it. According to 9th Circuit, this is ratification. Bouman v. Block, 940 F.2d 1211, 1231 (9th Cir.), cert denied, 112 S.Ct. 640, 116 L.Ed.2d 658 (1991).

2. Unsettled Area of Law

This Court has identified a municipal "policy," even where the policymaker has failed to act affirmatively at all, so long as the need to take some action to control the agents of the government "is so

obvious, and the inadequacy [of existing practice] so likely to result in the violation of constitutional rights, that the policymake[r] ... can reasonably be said to have been deliberately indifferent to the need." City of Canton v. Harris, 489 U.S. 378, 390, 109 S.Ct. 1197, 1205, 103 L.Ed.2d 412 (1989). "Where, in the most obvious example, the policymaker sits on his hands after repeated, unlawful acts of subordinate officers and that failure 'evidences a 'deliberate indifference' to the rights of [the municipality's] inhabitants,' id., at 389, 109 S.Ct., at 1205, the policymaker's toleration of the subordinates' behavior establishes a policy-in-practice just as readily attributable to the municipality as the one-act policy-in-practice described above. Such a policy choice may be inferred even without a pattern of acts by subordinate officers, so long as the need for action by the policymaker is so obvious that the failure to act rises to deliberate indifference." Id., at 390, n. 10, 109 S.Ct., at 1205, n. 10.

This Court has not held that such ratification is limited to "extreme factual situations." Petitioner is aware of no other circuits so holding. Petitioner is unclear as to the breadth of the court of appeals' holding. Does it mean that there has to be extreme injury? Or is it directed solely at the excessive use of force? If so, does it mean that the force used has to be deadly in order for ratification to apply? In the present case, the officer used a knee strike that caused the rupture of a femoral artery—a very serious injury. The court of appeals determined that the force used on Mr. Peterson was, in fact, excessive

force. Is the reason that it was not "extreme" because there was no weapon involved? Petitioner did not allege a failure to investigate or that the policymaker passively "went along" with the conduct. In this case, there was an investigation disclosing that both officers clearly lied about the incident, that a knee strike was excessive under the circumstances (in the officer's own testimony), that neither officer was disciplined even for the acknowledged lies, that the entire chain of command condoned the conduct and that the policymaker himself found that both officers followed the city's policies and procedures. The need for action in these circumstances was very obvious. The result of condoning this conduct should be obvious.

CONCLUSION

In this area, it is hard to find a lawyer to handle a civil rights case these days, partly because nobody knows what the standards are for liability. But if civil law does not hold these cities and their police forces accountable, how will we stop abuses? Stopping abuse of power is everything in this country. It is why we have checks and balances at every level of government. A gun and a badge are powerful. Unchecked, they are the ultimate power. If a city policymaker knows of abuses by police and allows them to continue, that is not only an abuse of power by the city, it is confidence that such abuse will go unchecked. Who will protect the citizens?

Respectfully submitted,

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February 15, 2010

Supreme Court, U.S.
FILED

NO. 09-983 FEB 16 2010

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VOL. I

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED November 17, 2009
Charles R. Fulbruge III, Clerk

No. 08-10258

KEVIN SCOTT PETERSON
Plaintiff - Appellant

V.

CITY OF FORT WORTH, TEXAS
Defendant - Appellee

Appeal from the United States District Court
for the Northern District of Texas

Before JONES, Chief Judge, JOLLY, Circuit Judge, and MONTALVO,* District Judge.

E. GRADY JOLLY, Circuit Judge:

This case, brought as a § 1983 action, presents the question whether the City of Fort Worth incurs

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*United States District Judge, Western District of Texas, sitting by designation.

municipal liability under *Monell v. Dept of Social Servs.* for the alleged excessive force of two of its police officers. See 436 U.S. 658 (1978). Kevin Peterson, who has alleged that he was seriously injured by Fort Worth police officers during the course of an arrest, has not sued the officers individually. Instead, he filed this action against the City of Fort Worth, alleging that officers violated his Fourth Amendment rights by unlawfully detaining him and using excessive force to restrain him. The City counters that the detention and force were reasonable under the Fourth Amendment, and that, in any event, it is not liable because Peterson cannot show that a policy, practice, or custom of the City was the moving force behind the violation. The district court granted summary judgment for the City, finding neither a violation nor municipal liability. We agree that the evidence does not support a claim of unlawful detention, but conclude there is sufficient evidence to establish excessive force. In short, if Peterson had sued the officers, he would have had a colorable claim. Nonetheless, he chose not to do so and because the evidence will not support municipal liability for the individual misconduct of the officers, summary judgment was proper and we affirm.

I.

We begin with a brief summary of the facts, stating them most favorably to Peterson.

On the night of August 14, 2005, Peterson and his wife Jodi joined some friends for a birthday party

at Riscky's Bar-B-Que in Fort Worth's historic "Stockyards" district. They parked their extended cab pick-up truck in a parking lot near an establishment called Billy Bob's Texas, the self-proclaimed world's largest honky-tonk. They had dinner at Riscky's Bar-B-Que and at about 10:00 p.m. walked over to a dance club, The Cantina Cadillac. There Peterson had six to eight beers; Jodi had three or four. They stayed until the club closed at 2:00 a.m. Because they were intoxicated, they decided not to drive home but to instead sleep in their truck. Peterson crawled into the back, and Jodi crawled into the front.

A Stockyards security guard later observed two persons sleeping in a truck near Billy Bob's Texas and called the Fort Worth Police Department. Officers Samantha Horner and Roger Ballard arrived at the scene at about 5:00 a.m. and there they found the Petersons sleeping.

Officer Horner tried to wake Peterson up. According to Officer Horner, she opened the unlocked rear door and shook Peterson's leg, but he did not respond. She then tapped her baton on Peterson's sternum; he kicked at her and told her to leave him alone. He began to doze, and she reached into the cab. He swatted at her, and she told him that she was a police officer and that he needed to get out of the truck. When he began to doze again, she grabbed his arm. Peterson then hit her on the forearm. Officer Horner alerted Officer Ballard that Peterson had hit her, and asked for his assistance in getting Peterson out of the truck.

Peterson testified that at this point he woke up. He recalled:

> The first thing I remember upon waking up was I was being drug out of the truck by my clothes. I was laying on my back. I actually hit the ground. The door was opened, and they drug me out. I was sliding on my back on the ground; and I had two police officers on me wrestling me to the ground .... And then they rolled me over and put my hands behind my back and put cuffs on me.

Peterson stated that after he was handcuffed the officers pulled him up by the cuffs' chain:

> They just jerked me up off the ground and... spun me around [and] slammed me up against the bed of the truck .... [T]here wasn't any struggle with me ....
>
> And then I noticed hey, these are cops .... I didn't say anything at that point.

According to Peterson, Officer Ballard was cursing at him when he delivered a hard knee strike to Peterson's thigh:

> The male officer was screaming in my ear. He was on my left, and he was saying you motherfucker. And he reared back and kneed me in the thigh with his knee...[W]hen he did it, I cringed. I go

> ugh.... and I was . . immediately enraged because it was totally unnecessary for him to beat on me when I was in cuffs.[1]

Meanwhile, Jodi identified Peterson as her husband. At Officer Horner's instruction, Jodi remained seated in the cab.

Officer Ballard collected Peterson's billfold and license. After a background check produced no record, Officer Ballard uncuffed and released Peterson. Peterson stated that the whole time his leg was pounding.

The Petersons got back into their truck and waited until about 7:00 a.m. to drive home. When they got there, Peterson undressed and discovered that his leg needed medical treatment. At the hospital, doctors diagnosed him with a ruptured femoral artery. The injury required two surgeries and a hospital stay that lasted almost two weeks.

Peterson filed this § 1983 action against only the City of Fort Worth, choosing not to sue Officers Horner and Ballard, whom he alleged violated his

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[1] Officer Ballard denies that he cursed at Peterson and delivered a knee strike to Peterson's thigh. He stated that Peterson's resistance was minimal, and that a knee strike was unnecessary. Officer Horner, however, observed the knee strike and called it "an approved distraction technique." For the purposes of its motion for summary judgment, the City conceded that Officer Ballard delivered a knee strike to Peterson's thigh.

Fourth Amendment rights by unlawfully detaining him and by using excessive force, specifically the knee strike, to restrain him. The district court concluded that the detention was lawful and that the force was not excessive under the circumstances. The district court also concluded that, even if the officers had violated Peterson's rights, the City was not liable because Peterson did not show that a policy, practice, or custom of the City was the moving force behind the officers' conduct. The district court entered summary judgment for the City, and Peterson appeals. For reasons we explain below, we find sufficient evidence to establish his excessive force claim. Nevertheless, because we conclude that the record evidence will not support municipal liability for the alleged misconduct of the individual officers, we affirm judgment for the City.

II.

We review the district court's grant of summary judgment de novo, applying the same legal standards as the district court. *United States v. Corpus*, 491 F.3d 205, 209 (5th Cir. 2007). Summary judgment is appropriate only "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. Civ. P. 56(c).

In determining whether a genuine issue as to any material fact exists, we must view the evidence in the light most favorable to the nonmoving party. *Corpus*, 491 F.3d at 209. The nonmoving party "must

identify specific evidence in the record and articulate the manner in which that evidence supports that party's claim." *Johnson v. Deep East Tex. Reg'l Narcotics Trafficking Task Force*, 379 F.3d 293, 308 (5th Cir. 2004). The identified evidence "must be sufficient to sustain a finding in favor of the nonmovant on all issues as to which the nonmovant would bear the burden of proof at trial." *Id.*

We address the threshold issue of whether officers violated Peterson's Fourth Amendment rights before we address the issue of municipal liability.

III.

The Fourth Amendment guarantees the right to be free from unreasonable searches and seizures. "The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." See, e.g., *Florida v. Jimeno*, 500 U.S. 248, 250 (1991) (citing *Illinois v. Rodriguez*, 497 U.S. 177 (1990)). The touchstone of the Fourth Amendment is thus reasonableness. Id. (citing *Katz v. United States*, 389 U.S. 347, 360 (1967)). We measure reasonableness "in objective terms by examining the totality of the circumstances." *Ohio v. Robinette*, 519 U.S. 33, 39 (1996).

Peterson alleges that officers violated his Fourth Amendment rights by unlawfully detaining him and using excessive force to restrain him. Both unlawful detention and excessive force implicate the Fourth Amendment's proscription

against unreasonable seizures. See *Terry v. Ohio*, 392 U.S. 1, 16 n.16 (1968) ("[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person.").

A.

We first address the alleged unlawful detention.

Peterson argues the officers had no lawful justification for entering his truck and detaining him because they had no reasonable suspicion to believe he had committed a crime. He contends the officers acted on the mere "neutral facts" that the Petersons were parked near drinking establishments and were asleep in their vehicle. Peterson argues that those neutral facts did not support reasonable suspicion and, without it, the officers had no lawful justification for detaining him.

The City counters, and the district court held, that the officers' actions were reasonable in the light of their articulated concerns for the Petersons' safety. The City points to deposition testimony in which the officers stated that they were concerned for the Petersons' safety. Officer Horner testified that she tried to wake Peterson not because she suspected criminal activity but because "for his safety" she needed "to get compliance." Officer Ballard testified that they "didn't know if either one or two of them were simply intoxicated or had been hit in the head and left there, robbed."

We face here the kind of officer-citizen encounter that is controlled by *Terry v. Ohio*, 392 U.S. 1 (1968). In *Terry*, the Supreme Court recognized that "[e]ncounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute crime." *Id.* at 13. *Terry* itself addressed the kind of informal officer-citizen encounters that arise when officers make on-the-spot observations that require immediate action. Id. at 20. In assessing the reasonableness of such actions, "there is 'no ready test." *Id.* at 21. Instead, a court must "focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen." *Id.* at 20-21 (*quoting Camara v. Mun. Ct.*, 387 U.s. 523, 536-37 (1967)). The officer must be able to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21. The court then asks: "would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief that the action taken was appropriate?" *Id.* at 22.

In other words, as we have previously stated: "We must attempt to put ourselves in the shoes of a reasonable police officer as he or she approaches a given situation and assesses the likelihood of danger in a particular context." *United States v. Rideau*, 969 F.2d 1572, 1574 (5th Cir. 1992) (en banc).

We agree with the district court that the detention was reasonable. The officers were responding to a call the Fort Worth Police Department received from a Stockyards security guard. The officers observed two persons, apparently unconscious, in a truck. It was early in the morning. The doors to the truck were unlocked. The persons were unresponsive to the officers' initial attempts to wake them. The officers had responsibilities for the persons' safety; it was not apparent whether the persons "were simply intoxicated or had been hit in the head and left there, robbed." The officers thus have pointed to "specific and articulable facts" that reasonably warranted their action. We think these facts clearly "warrant a man of reasonable caution in the belief' that the officers' actions were appropriate, and thus conclude this seizure was reasonable within the meaning of the Fourth Amendment. Accordingly, Peterson's detention was not unlawful.

B.

With respect to the excessive force claim, Peterson argues the knee strike used by Officer Ballard was unnecessary and excessive. He contends that at the time Officer Ballard delivered the knee strike to his thigh, Peterson was in full compliance with all police orders and was offering no resistance. Jodi was seated in the truck cab and Peterson himself was handcuffed. Of the moments leading up to the knee strike, Peterson testified:

> I can't recall putting up any resistance; but I was being attacked by two people.
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> I didn't know they were police officers, because I just woke up when they drug me out of the truck. So I might have been - I know I was confused, and I didn't know why I was being attacked....Is it possible I struggled? I don't see much - there wasn't much of a struggle from me .... It happened so fast there wasn't any time to struggle. I was rolled over on my stomach, and both officers had my arms behind my back; and they put cuffs on me . . . . And one of them, I believe it was the man, had his knee on my neck .... [A]nd both of them pried my arms behind my back with brute force and put cuffs on me. And one of them was sitting on my back, and the other one had his knee on my neck grinding my face .... I couldn't do anything. I don't think I struggled.

The City argues that Peterson was belligerent and the knee strike was necessary to restrain him. The City points to deposition testimony in which Officer Horner stated that Peterson kicked at her and hit her forearm when she first tried to wake him. Officer Ballard stated that outside of the truck Peterson struggled to escape his grasp. In Officer Ballard's words, Peterson "still continued to fail to comply. He wouldn't stand still. He was pulling away from us .... He [took] an aggressive stance toward us

and [did] not [comply] to what we're asking him to do."

Our precedent requires that to establish a claim of excessive force, a plaintiff must show that, in addition to being seized, he suffered "(1) an injury that (2) resulted directly and only from the use of force that was excessive to the need and that (3) the force used was objectively unreasonable." *Ballard v. Burton*, 444 F.3d 391, 402 (5th Cir. 2006) (quoting *Flores v. City of Palacios*, 381 F.3d 391, 396 (5th Cir. 2004)). There is no dispute that Peterson suffered an injury and, for purposes of its motion for summary judgment, the City conceded that Officer Ballard delivered a knee strike to Peterson's thigh. The question is whether that knee strike was excessive to the need and therefore objectively unreasonable. We determine whether the force was excessive "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989); see also *Ballard*, 444 F.3d at 402.

The district court held that the knee strike was not excessive. The district court pointed out that the evidence showed that Peterson had been drinking, and that he hit Officer Horner on the forearm and resisted Officer Ballard's efforts to restrain him. The district court observed that Peterson's own testimony did not contradict the officers' testimony that Peterson had resisted compliance; Peterson stated that "there wasn't much of a struggle," but he did not deny resisting the officers.

I.

We agree that the conflicting testimony does not rule out the possibility that some force may have been reasonable to restrain Peterson. But the evidence supporting the reasonableness of the police response is clearly disputed concerning whether continuing force in the form of a knee strike was justifiable after Peterson had been handcuffed. Peterson unequivocally testified that Officer Ballard did not strike him until after he had been handcuffed.

Nor does it escape our notice that the City conceded that Officer Ballard struck Peterson with his knee, yet Officer Ballard himself denied that he struck Peterson. Officer Ballard testified that Peterson resisted, but only minimally, such that a knee strike would have been unnecessary.

Thus, the existing evidence raises unresolved questions about what occurred. We therefore hold that the evidence creates a genuine issue of material fact as to whether, from the perspective of a reasonable officer on the scene, the knee strike was excessive and therefore objectively unreasonable. Summary judgment as to Peterson's excessive force claim was therefore improper.

IV.

The question now becomes whether summary judgment was nonetheless proper as to the City's liability for the alleged misconduct of its officers.

A.

We will begin with the basic principles of municipal liability for the misconduct of its employees in § 1983 actions.

It is well-established that a city is not liable under § 1983 on the theory of respondeat superior. *Monell*, 436 U.S. at 694; *Johnson*, 379 F.3d at 308. A municipality is almost never liable for an isolated unconstitutional act on the part of an employee; it is liable only for acts directly attributable to it "through some official action or imprimatur." *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001). To establish municipal liability under § 1983, a plaintiff must show that (1) an official policy (2) promulgated by the municipal policymaker (3) was the moving force behind the violation of a constitutional right. *Id.*

Official policy establishes culpability, and can arise in various forms. It usually exists in the form of written policy statements, ordinances, or regulations, but it may also arise in the form of a widespread practice that is "so common and well-settled as to constitute a custom that fairly represents municipal policy." *Id.* at 579 (quoting *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984) (en banc)).

A policy or custom is official only "when it results from the decision or acquiescence of the municipal officer or body with 'final policymaking

authority' over the subject matter of the offending policy." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989). Thus, a plaintiff must show the policy was promulgated by the municipality's policymaker. There is no "de facto" final policymaking authority. See *Gros v. City of Grand Prairie, Tex.*, 181 F.3d 613, 616 n.2 (5th Cir. 1999) (quoting *City of St. Louis v. Praprotnik*, 485 U.S. 112, 131 (1988)). Here the parties agree that Chief Mendoza has final policymaking authority over the Fort Worth Police Department.

Finally, a plaintiff must establish that the policy was the moving force behind the violation. In other words, a plaintiff must show direct causation. See *Piotrowski*, 237 F.3d at 580. This means "there must be a direct causal link" between the policy and the violation. *Id.*, see also *Johnson*, 379 F.3d at 310 (quoting *Fraire v. City of Arlington*, 957 F.2d 1268, 1281 (5th Cir. 1992) ("must be more than a mere 'but for'")).

Peterson acknowledges that there is no official written or otherwise specially articulated policy upon which he can rely. Nevertheless, he advances several theories of municipal liability. He alleges that the use of excessive force by Fort Worth Police Department officers is so common, and well known to the policymakers, that it constitutes a custom that fairly represents official policy. In addition, he alleges the City is also liable because it ratified the use of excessive force in this case and generally failed either to train or supervise its officers.

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B.

Because we can quickly conclude that the City is not liable for any violation under the theories of ratification or failure to train or supervise, we address those arguments first.

Peterson alleges the City is liable because Chief Mendoza ratified the officers' conduct. He points out that Chief Mendoza determined after investigation that Officers Horner and Ballard's conduct complied with the department's policies. Peterson cites *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), which acknowledges that "[i]f the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final." *Id.* at 127. But our precedent has limited the theory of ratification to "extreme factual situations." See *Snyder v. Trepagnier*, 142 F.3d 791, 798 (5th Cir. 1998). Under that precedent, we cannot say that this case presents an extreme factual situation. Compare *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985) (finding ratification in case in which officers "poured" gunfire onto a truck and killed innocent occupant), with Snyder, 142 F.3d at 798 (refusing to find ratification in case in which officer shot fleeing suspect in the back). Moreover, we have also explained that a policymaker who defends conduct that is later shown to be unlawful does not necessarily incur liability on behalf of the municipality. See *Coon v. Ledbetter*, 780 F.2d 1158, 1161-62 (5th Cir. 1986) (precedent "does *not* stand for the broad proposition that if a policymaker defends

his subordinates and if those subordinates are later found to have broken the law, then the illegal behavior can be assumed to have resulted from an official policy"). Our precedent thus forecloses ratification liability in this case.[2]

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[2] The dissent acknowledges that ratification is "seldom, if ever, found by this court." It maintains, however, that Peterson put forth evidence of ratification sufficient to withstand summary judgment by showing that neither Officer Ballard nor Officer Horner was disciplined for the use of force or failure to file a "Use of Force Report" following the incident, and by pointing to Chief Mendoza's deposition testimony that both officers complied with the City's policies and procedures. However, this evidence, viewed in the light most favorable to Peterson, is insufficient to create a fact issue regarding the City's policymaker's ratification of unconstitutional conduct. In City of St. Louis v. Praprotnik, a case on which Peterson relies, the Supreme Court emphasized that "[s]imply going along with discretionary decisions made by one's subordinates, however, is not a delegation to them of the authority to make policy. ." 485 U.s. 112, 130 (1988). Additionally, "the mere failure to investigate the basis of a subordinate's discretionary decisions does not amount to a delegation of policymaking authority ... ." *Id.* See also *Kibbe v. City of Springfield*, 777 F.2d 801, 809 n.7 (1st Cir. 1985) ("The [district] court suggested that the City had ratified defendant Perry's action by clearing him and finding that he had acted in accordance with the police department's policies. We are unconvinced that a failure to discipline Perry or other officers amounts to the sort of ratification from which a jury properly could infer municipal policy.").

The dissent also acknowledges that ratification applies only in "extreme factual situations." It maintains, however, that our conclusion that this was not an "extreme factual situation" is a "factual determination," which we are not permitted to make. On the contrary, our conclusion rests on a legal determination that the facts here, even viewed in the light most favorable to Peterson, do not satisfy the legal standard set out in our ratification caselaw.

Peterson also alleges that the City was deliberately indifferent to the obvious need for training on the risk of injuries from knee strikes. He points to Officer Ballard's testimony that he did not "recall being told that there was any risk of injury from a knee strike" nor that training "may have made a difference" in his evaluation of the use of force. The failure to train can amount to a policy if there is deliberate indifference to an obvious need for training where citizens are likely to lose their constitutional rights on account of novices in law enforcement. See *Brown v. Bryan Co.*, Okla., 219 F.3d 450, 458 (5th Cir. 2000). "[U]nder certain circumstances, § 1983 liability can attach for *a single decision not to train an individual officer* even where there has been no pattern of previous constitutional violations." *Id.* at 459. But those circumstances are not present here. We have previously held that to hold a municipality liable for failure to train an officer, it must have been obvious that "the highly predictable consequence of not training" its officers was that they "would apply force in such a way that the Fourth Amendment rights of [citizens] were at risk." *Id.* at 461. Peterson points to no evidence that the City was aware of any risk of injury from knee strikes, and the City showed that officers otherwise go through extensive training on the use of force. Particularly in the absence of evidence that the use of knee strikes had caused serious injuries on previous occasions, Peterson has

presented no material fact question to show that it should have been obvious to the policymakers that the risk of serious injury was a "highly predictable consequence" of the failure to train. See *Estate of Davis ex rel. McCully v. City of North Richmond Hills*, 406 F.3d 375, 383, 386 (5th Cir. 2005) (deliberate indifference usually requires "'at least a pattern of similar incidents in which the citizens were injured" (citation omitted), and "narrow" single incident exception has applied when the court finds a complete failure to train, not just a failure to train in "one limited area").[3]

In a similar vein, Peterson alleges the City was deliberately indifferent to the need to supervise its officers adequately. Again, for the City to be liable for failure to supervise, it at least must have been

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[3] Though the evidence cited by the dissent may create a factual dispute as to whether the City's police officers received sufficient training on the practice and consequences of knee strikes, "that a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city . . . ." *City of Canton v. Harris*, 489 U.S. 378, 390 (1989). Rather, the "vigorous test" of "deliberate indifference," *Brown*, 219 F.3d at 461, is required because a "lesser standard of fault would result in de facto respondeat superior liability on municipalities-a result [the Supreme Court] rejected in Monell." *Canton*, 489 U.S. at 392. Here, no reasonable jury could conclude that a risk of injury to citizens was the "obvious," "highly predictable consequence" of a lack of knee strike training, as Peterson has not shown that the City had "sufficient notice" that knee strikes were frequently used, particularly dangerous, or had previously resulted in injury, much less an injury of the type experienced by Peterson. *Brown*, 219 F.3d at 458.

obvious that "the highly predictable consequence" of not supervising its officers was that they "would apply force in such a way that the Fourth Amendment rights of [citizens] were at risk." *Id.* at 461. As an example of the department's failure to supervise, Peterson points to the fact that Officer Horner failed to fill out a use of force report, in violation of department policy, after she witnessed Officer Ballard use force on Peterson. Even assuming this to be true, however, the department did demonstrate some supervision by conducting a thorough internal affairs investigation into the incident and into a possible misstatement made in Officer Horner's activity report. The department's failure to reprimand one officer for an instance of faulty recordkeeping would not alone raise a genuine issue of material fact on whether the obvious and "highly predictable consequence" of the department's actions was that citizens' Fourth Amendment rights would be violated, and Peterson has otherwise provided no evidence of inadequate supervision. We find no evidentiary support to submit municipal liability to the jury on the theory that the department failed to supervise its officers.

Accordingly, the district court properly held on summary judgment that the City is not liable for any violation under the theories of ratification or failure to train or supervise.

C.

Finally, we address whether Peterson has presented sufficient evidence to establish a

fact question for municipal liability on the basis that the City maintained an official policy that was permissive of excessive force. As we have stated, Peterson must show some evidence to support that an official policy of the City was the moving force behind the excessive force that violated his Fourth Amendment rights. *Piotrowski*, 237 F.3d at 578. He concedes that there is no written policy supporting his claim of municipal liability. Instead he argues that a pattern of excessive force in making arrests establishes that the City maintained an unwritten policy that was permissive of the use of excessive force. In support, he points to 27 complaints of excessive force between 2002 and 2005. The legal question thus presented is whether the 27 complaints on which Peterson relies are sufficient to establish a pattern of excessive force that can be said to represent official policy.

A pattern is tantamount to official policy when it is "so common and well-settled as to constitute a custom that fairly represents municipal policy." *Id.* At 579 (quoting *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984) (en banc)). Where prior incidents are used to prove a pattern, they "must have occurred for so long or so frequently that the course of conduct warrants the attribution to the governing body of knowledge that the objectionable conduct is the expected, accepted practice of city employees." *Webster*, 735 F.2d at 842. It is thus clear that a plaintiff must demonstrate "a pattern of abuses that transcends the error made in a single case." *Piotrowski*, 237 F.3d at 582 (citations omitted). A pattern requires similarity

and specificity; "[p]rior indications cannot simply be for any and all 'bad' or unwise acts, but rather must point to the specific violation in question." *Estate of Davis ex rel. McCully v. City of North Richland Hills*, 406 F.3d 375, 383 (5th Cir. 2005).

A pattern also requires "sufficiently numerous prior incidents," as opposed to "isolated instances." *McConney v. City of Houston*, 863 F.2d 1180, 1184 (5th Cir. 1989). *In Pineda v. City of Houston*, 291 F.3d 325 (5th Cir. 2002), we held that eleven incidents of warrantless entry did not support a pattern of unconstitutional warrantless entry. In each of those eleven incidents, officers reported either consent or exigent circumstances. *Id.* at 329 n.12. We observed that "[e]leven incidents each ultimately offering equivocal evidence of compliance with the Fourth Amendment cannot support a pattern of illegality in one of the Nation's largest cities and police forces." *Id.* at 329.

The district court, relying on *Pineda*, held that the 27 complaints on which Peterson relies were insufficient to establish a pattern of excessive force. After careful examination of the record, we conclude the district court did not err.

Peterson presented evidence that, according to the City's internal affairs records, at least 27 complaints of excessive force were filed between 2002 and 2005. Almost all arose from officers' investigations of what maybe called small crimes; the injuries suffered, however, ranged from minor lacerations to broken bones. In one incident, officers

allegedly stopped a suspect who was riding a bicycle and, after he had dismounted the bicycle and lay on the ground, beat him until his face bled and his nose and eye socket were fractured. In another incident, an officer who detained an individual as a suspect in the burglary of a car wash knee-struck him in the back and broke his jaw; that individual turned out to be, not a suspect, but one of the car wash's owners. In yet another incident, officers allegedly punched and beat a suspect until he suffered a head injury; although the officers claimed that the suspect was carrying a crack pipe, they were unable to produce the pipe. And finally, in an even more alarming incident, officers responding to a call alleging tampering with an electrical box entered an apartment without a warrant and allegedly tased an individual until he was unconscious and had stopped breathing.

The incidents allege use of force that, if true, would be emphatically excessive. Nevertheless, assuming their truth, the incidents do not, on the basis of this record, tell us that the City maintained an official policy of condoning excessive force. The failure of the evidence is that the plaintiffs have failed to provide context that would show a pattern of establishing a municipal policy.[4] For example, the

[4] Twenty-seven incidents in four years, with no context as to the overall number of arrests or any comparisons to other cities, is not sufficient evidence of a pattern rising to the level of a policy. The burden of providing a context that would show such a pattern falls on the plaintiff, not on the City, and Peterson has failed to meet that burden. No reasonable jury could conclude based on Peterson's evidence that the City had

record does not indicate the size of the Fort Worth Police Department or how many arrests were made by the department between 2002 and 2005. We have previously indicated that the size of a police department may be relevant to determining whether a series of incidents can be called a pattern. *Pineda*, 291 F.3d at 329 ("Eleven incidents each ultimately offering equivocal evidence of compliance with the Fourth Amendment cannot support a pattern of illegality in one of the Nation's largest cities and police forces."). Although the record omits any evidence of the department's size or the number of its arrests, the department's own website indicates that it presently employs more than 1,500 officers, and that there were more than 67,000 incidents of crime in the last year alone. Given the department's size, and absent any evidence of its total number of arrests during the same time period, 27 incidents of excessive force over a period of four years do not reflect a pattern that can be said to represent official policy of condoning excessive force so as to hold the City liable for the acts of its employees' unconstitutional conduct. To hold otherwise would be effectively to hold the City liable on the theory of respondeat superior, which is expressly prohibited by *Monell*. See 436 U.S. at 694.

The record does indicate that for each of the 27 complaints of excessive force the department conducted an internal investigation, a fact that would appear to cut against the argument that the

established a municipal policy of using or condoning excessive force.

City condoned the use of excessive force. The City itself has relied on the fact that only four of the 27 complaints were "sustained" after investigation and, indeed, in each of the incidents described above, the department found the complaint of excessive force either "not sustained" or "unfounded." However, that the department itself vaguely ruled most of its complaints "not sustained" or "unfounded" is no assurance that these investigations exonerate the City. To the contrary, that only four of the 27 complaints were "sustained" after investigation may tilt in Peterson's favor. Nevertheless, even assuming error in the unsustained investigations, the record as a whole will not support a legal conclusion that the City maintained an official policy of condoning excessive force.

In sum, the 27 incidents, in the context of this record, do not suggest a pattern "so common and well-settled as to constitute a custom that fairly represents municipal policy." *Piotrowski*, 237 F.3d at 579.

V.

In conclusion, there was sufficient evidence to establish Peterson's excessive force claim. Peterson, however, did not sue the officer or officers who violated his constitutional rights. Instead he sought to impose liability on the City of Fort Worth for the misconduct of its employees. In this connection, he failed to produce evidence to satisfy the demanding standards required by *Monell* and its progeny to hold the City liable, all for the reasons we have detailed in

this opinion. Accordingly, the judgment of the district court is

AFFIRMED.

MONTALVO,*** District Judge, concurring in part and dissenting in part.

At issue on review is whether Peterson met his burden, as the non-moving party to the City's summary judgment motion, of showing a dispute of material fact concerning his claims. The majority properly sets forth the standard of review on summary judgment, noting it should apply the same legal standard that the district court applied. I CONCUR with the findings in Part III of majority opinion, *supra*, that Peterson's seizure was reasonable within the meaning of the Fourth Amendment and therefore lawful, but that the evidence creates a genuine issue of material fact as to whether the knee strike was excessive and therefore objectively unreasonable, from the perspective of a reasonable officer on the scene.

However, with regards to the City's summary judgment motion as to municipal liability in Part IV of the majority opinion, *supra*, I believe the majority holds Peterson to a higher standard than the law requires. Accordingly, I respectfully DISSENT as

*** United States District Judge, Western District of Texas, sitting designation.

to the majority's finding there is no genuine issue of fact for trial concerning municipal liability.

I.

The court's task is to review the evidence and resolve all reasonable doubts and inferences in a light most favorable to Peterson, as the non-moving party. *Richardson v. Oldham*, 12 F.3d 1373, 1381-82 (5th Cir. 1994); *McKee v. City of Rockwall, Tex.*, 877 F.2d 409, 410 (5th Cir. 1989). Peterson only needs to present "some evidence of... a policy in order to survive the [City's] summary judgment motion." See *McKee*, 877 F.2d at 414-15. That is, Peterson need only present sufficient evidence to show there is a dispute of fact regarding the City police department's policy on use of force "that a reasonable jury could return a verdict for the nonmoving party." *Fraire v. City of Arlington*, 957 F.2d 1268, 1273 (5th Cir. 1992). Accordingly, such evidence must have probative weight. See *McKee*, 877 F.2d at 415. Nonetheless, only "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 414-15 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986)) (emphasis added). This court has made clear: "[c]redibility determinations have no place in summary judgment proceedings." *Richardson*, 12 F.3d at 1381-82.

II.

A.

In the first instance, the majority summarily dismisses Peterson's argument and the evidence concerning liability based upon a theory of ratification. The majority states a theory of ratification depends upon "extreme factual situations," but does not explain how it reached the determination that Peterson failed to present an extreme factual situation, given the existing disputes of material fact.

Evidence on this issue included 1) Chief Mendoza's deposition testimony, in which he states both Officer Ballard and Officer Horner acted in conformity with the City's policies and procedures; and in which he states if there is no discipline for excessive force, the lack of discipline could be construed as tacit approval of the use of force; 2) Officer Horner's deposition testimony, in which she states she believes she saw Officer Ballard knee strike Peterson; and 3) Officer Ballard's deposition testimony that a knee strike against Peterson would have been excessive force because Peterson was under control; not a threat; and not engaged in any behavior that justified a knee strike.

The City argues it is not liable under a theory of ratification because the officers were faced with an aggressively resisting individual and offers its written policies in support.

The district court's dismissal of this basis for municipal liability, and the majority's summary affirmance of that decision, is problematic based upon the applicable burdens of proof for the respective parties. As the non-moving party, Peterson's burden of proof at summary judgment is sufficient evidence, which creates a dispute of material fact. See *Fraire*, 957 F.2d at 1273. It is true that ratification is seldom, if ever, found by this court. As the majority points out, a policymaker who defends conduct later shown to be unlawful does not necessarily incur liability on behalf of the municipality; nonetheless, this does not foreclose the possibility that the municipality may incur liability. "If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127, 108 S. Ct. 915, 926, 99 L. Ed. 2d 107 (1988).

The majority distinguishes between the instances in which the court has permitted a party to succeed on a theory of ratification, and this case, noting this is not an "extreme factual situation." Even though there is a dispute of facts concerning what exactly occurred between Officers Ballard and Horner and Peterson, the majority holds the factual situation is not extreme enough for a theory of ratification to apply. The majority is making a factual determination. It is *for the jury* to make factual and credibility determinations. See *Richardson*, 12 F.3d at 1381-82.

Here, Peterson showed: at least two people, he and Officer Horner, believed Officer Ballard performed a knee strike; Officer Ballard did not believe a knee strike was warranted under the circumstances; and neither officer was disciplined for the incident, despite the department's policy that when an officer uses force or sees another officer use force, a Use of Force report is to be filled out.

City of Forth Worth Police Department General Order 306.09 requires "any use of force incident during which the level of force used was hard open-hand control and restraint or greater shall be reported and identified as 'Use of Force by an Officer." The General Order specifically directs an officer to "report the full details of the use of force in related arrests or offense reports. If no arrest or offense report is to be completed, the details shall be reported in an incident report."

At the time of completing the Use of Force report, "[a] separate inter-office correspondence will be completed by the supervisor and forwarded through the officer's chain of command to be reviewed and filed by the bureau." These reports are supposed to be completed at the end of an officer's watch and are to be entitled "Use of Force" and routed to the captain for management review. The captains are charged with reviewing the Use of Force reports "to determine if there is a need for changes in departmental procedures or additional training for the officer" (emphasis added).

Officer Horner testified she saw Officer Ballard use force - a knee strike- which, according to the City's evidence, is hard open-hand control. Yet, she never filled out a Use of Force report. When it was discovered she never filled out a Use of Report, she was not disciplined for this failure. Chief Mendoza described Officer Horner's failure to fill out the Use of Force report as "ancillary" to the investigation of Peterson's allegations. This is problematic for several reasons.

According to evidence presented by the City, such Use of Force reports eventually are supposed to be forwarded to the Training Division for review. According to General Order 306.10, a Training Division captain is tasked with ensuring appropriate training is developed and offered annually. If the police department is not enforcing the self-reporting of use of force, despite the fact that they have an officer who states she believes she saw force used, it is essentially condoning the failure to report. This, in turn, ensures there will *never* be an assessment of whether training on excessive force should be conducted with greater regularity or in a different manner. Coupling these circumstances with the Defensive Tactics Manual of the Fort Worth Police Academy's maxim, "If it makes you look good, but it's not in your report, it didn't happen," there appears to be a tacit understanding that if an officer does not raise the issue, he or she may avoid it all together.

The district court attempted to address the issue of Officer Horner's failure to report the use of force when it dealt with Peterson's failure to

supervise argument. The district court stated the Internal Affairs investigation dealt with the deficiency and relied on Sergeant Decker's admonition to Officer Horner to be more diligent in the accurate documentation of her work product. Unfortunately, the district court was mistaken as to why Officer Horner was admonished.

The Internal Affairs investigation dealt with the falsification of Officer Horner's worksheet, including her notations regarding whether Peterson drove away after the encounter. This additional allegation of falsifying her worksheet, which was added during the course of the Internal Affairs investigation, was actually a recrimination against her mistake regarding whether Peterson stayed at the scene, left the scene, or called a friend. It had nothing to do with Officer Horner's failure to report Officer Ballard's use of force. If anything, the admonition looks more like an unscrupulous tactic meant to strong-arm a rookie officer into changing her statement by turning up the heat on her.[1]

Drawing all reasonable inferences in favor of Peterson based upon the evidence presented, Peterson has created a question of fact to be submitted to the jury regarding ratification. The City offers no evidence that renders all material

[1] Officer Horner received her commission as a Fort Worth Police Officer in December 2004, approximately nine months prior to the alleged incident.

facts indisputable. Defeating a summary judgment motion only requires the non-moving party to present sufficient evidence, which creates a dispute of material fact. Because there is sufficient evidence to create a dispute of material fact, I believe the issue of ratification should be submitted to the jury.

B.

The majority correctly points out municipal liability can be based upon a failure to train if there is deliberate indifference to an obvious need for training, which could impair citizens' constitutional rights. The majority sets forth that municipal liability on a failure to train theory requires that it be obvious that "the highly predictable consequence of not training" its officers was that they "would apply force in such a way that the Fourth Amendment rights of [citizens] were at risk." *Brown v. Bryan Co.*, Okla., 219 F.3d 450, 461 (5th Cir. 2000). The majority asserts that Peterson points to no evidence that the City was aware of any risk of injury to knee strikes, and instead relies on to the City's contention it conducts extensive training on the use of force. The majority concludes Peterson has failed to present a question of material fact concerning whether it was or "should have been obvious to the policy makers that the risk of injury was a 'highly predictable consequence' of the failure to train."

Again, the majority imposes a burden on Peterson, which exceeds what the law requires of him. Peterson need only present sufficient evidence,

which creates a dispute of fact concerning the City's failure to train. In evidence are:

> 1) Officer Horner's deposition testimony in which she stated she could not recall training about the adequate use of force for a given set of circumstances;
> 2) Officer Ballard's deposition testimony, in which he could not recall receiving training on differences between passive and active resistance in relation to the amount of force used; in which he stated an officer cannot evaluate risk of injury if there is no training; in which he stated he could not recall being told there was a risk of injury when using a knee strike; in which he stated he was written up previously for tasering an individual, who was handcuffed, but he was not told why the act was dangerous; in which he stated he was never retrained on the use of tasers; and in which he stated if he had knowledge regarding risk of using knee strikes, it would make a difference in his calculation of use of force;
> 3) Chief Mendoza's deposition testimony, in which he stated he was the overall authority for training and approving training policies of the department; in which he stated an officer is less likely to hit a person in a place that will cause more damage if they understand the reasons for doing so; and in which he stated continuing education does not include training on knee strikes, to his knowledge;

4) Records reflecting allegations of excessive force;
5) A summary chart, detailing allegations of excessive force;
6) Reports of the chain of command;
7) An affidavit of an instructor at the police academy, which states the City provides training in use of force at the police academy and subsequently every twenty-four months, in the form of continuing education, which exceed the minimum training requirements imposed by the state;
8) Officer Horner's training record; and
9) Officer Ballard's training record.

In reviewing this evidence, the court's task is only to determine whether there is a factual dispute regarding the City's failure to train. The evidence shows officers undergo preliminary training at the police academy, which includes use of force training, and continuing education training on use of force. Executive Chief Deputy Kneblick's affidavit states each police officer is trained in the application of the General Orders, which includes a General Order on the use of force, and is required to comply with the General Orders.

The more disconcerting pieces of evidence offered by the City, however, are Officer Horner's and Officer Ballard's training records. While Officer Horner's record shows she received continuing education on the use of force, Officer Ballard's record reveals he has not. Peterson has shown through Officer Ballard's testimony that he was disciplined

on a prior occasion for using a taser on a handcuffed individual. Officer Ballard's training record does not reflect any retraining on use of a taser, despite his inappropriate prior use. More critically, since the time Officer Ballard joined the police department, he has *never* taken a course directed specifically at the use of force, according to his training record.

Peterson contends his showing that neither officer could remember whether they received use of force training demonstrates the training is inadequate. Chief Mendoza testified he did not know how often knee-strike training occurred. While both Officers Ballard and Horner testified they were taught the distractionary technique of the knee strike, neither was taught the possible physical consequences of using such a strike. Chief Mendoza, the overall authority for approving training and the content of the Defensive Tactics Manual, testified that training concentrated on where to strike, rather than the *repercussions* of striking an individual in a particular place. He stated training probably covered that "a little bit." He agreed during his deposition testimony that an officer would be less likely to strike in a place that would cause serious damage if the officer knew the consequences, and he conceded the type of injury Peterson received could result from a knee strike.

When this evidence is viewed in light of the previous discussion concerning the Use of Force reports, see *supra* Part II.A of this dissent,[2]

[2] The majority's assertion that the department's failure to reprimand Officer Horner for "an instance of faulty

reasonable minds could infer a failure to train and deliberate indifference. The policymaker, Chief Mendoza, is hardly concerned with training officers on the potential for harm. It is axiomatic that if an officer does not know the risk of injury in applying a knee strike, there is no way he can appropriately assess when to use it based upon the totality of the circumstances. This would be true of any of the use of force techniques because officers receive no training on the repercussions of using such techniques, as Chief Mendoza testified. Hence, it is clear Peterson has created a dispute of material fact regarding the City's failure to adequately train its officers sufficient to submit to a jury.

C.

Finally, the majority addresses Peterson's argument the City has a custom, as evidenced by a persistent, widespread pattern of excessive force during investigations of "mild crimes," to which the police department's chain of command acquiesces by citing officers for lesser offenses, exonerating them

recordkeeping" does not raise a genuine issue of material fact on whether the obvious and "highly predictable consequences" of this failure would lead to the violation of citizens' Fourth Amendment rights ignores the purpose of the process of reporting the use of force. The express purpose of the Use of Force reports is "to determine if there is a need for changes in departmental procedures or additional training for the officer." If the department does not enforce the reporting requirement, it essentially bypasses the procedure meant to inform it of what, if any, use of force training is necessary to ensure citizens' constitutional rights are not violated.

for use of force, and only mildly disciplining officers who are found to have used excessive force, which amounts to tacit approval of the use of excessive force.

To demonstrate the existence of a custom or policy, Peterson presents the following evidence:

> 1) Chief Mendoza's deposition testimony, in which he states allegations of officers' use of excessive force in the field should be investigated; in which he states making an allegation of excessive force against other officers is a defensive measure to defend oneself and, ultimately, the officer may not be willing to come forward; in which he states he is the ultimate disciplinarian; in which he states a police officer may use force to effectuate an arrest/detention even if there is no legal basis for the arrest/detention (which the district court said was only an opinion and does not affect official policy); in which he discusses an incident where officers illegally entered an apartment and tasered an individual in the closet covered with a black trash bag three to four times until he was unconscious and concludes it was not excessive force;
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> 2) A summary chart which shows 27 allegations of excessive force over a five-year period, which were actually investigated by Internal Affairs-where only four complaints were sustained;

3) An interview of a third-party witness, who saw police chase down a man on a bicycle and beat him until his face bled-where the charge of excessive force was not sustained against one officer and unfounded for others;

4) An interoffice correspondence from Executive Deputy Chief Kneblick, reversing a finding of "not sustained" by the rest of the chain of command, in one incident where an off-duty officer struck two individuals on the backs of their heads with his gun; and

5) A summary statement, where a police officer knee-struck a man who was laying on the ground because he tensed, even though the man was actually the owner of the car wash where the police officer was investigating a burglary, which resulted in the officer breaking the owner's nose-the allegations of excessive force were deemed unfounded.

Peterson contends these allegations put the City on notice that there is an issue with its officers using excessive force and it is so common and well-settled that it represents a policy, which is tacitly condoned by the chain of command, up through the Chief of Police.

To demonstrate the City has a policy which expressly denounces the use of force, the City offers the following evidence:

1) General Orders regarding the use of excessive force;

2) An affidavit of Executive Deputy Chief Kneblick, who states the General Orders are

provided to all police officers of the police department regarding the use of force, and the police department supports this policy through training and discipline;

3) The claim there is no evidence the police department officials acquiesced to excessive force;

4) The City conducted a rigorous investigation of Peterson's complaint; and

5) Peterson's summary chart, which showed 4 findings of excessive force, no discipline in 18 investigations, and 1 case, which involved the use of a knee strike.

The majority initially couches the inquiry as "whether Peterson has presented sufficient evidence to establish a fact question for municipal liability on the basis that the City maintained an official policy that was permissive of excessive force." In the next instance, however, the majority couches the inquiry as a question of law, suggesting "[t]he legal question thus presented is whether the 27 complaints on which Peterson relies are sufficient to establish a pattern of excessive force that can be said to represent official policy."

It is not our duty to address the latter question. The appropriate question is whether Peterson has presented sufficient evidence to create a dispute of material fact about the existence of a widespread pattern of excessive force condoned by the City. The Supreme Court made clear that "[o]nce those officials who have the power to make official policy on a particular issue have been identified, it is

for the jury to determine whether their decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur, or by acquiescence in a longstanding practice or custom which constitutes the 'standard operating procedure' of the local governmental entity." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737, 109 S. Ct. 2702, 2724 (1989) (citations omitted). It is for the jury now to determine whether 27 instances of excessive force allegations are reflective of a standing operating procedure that may have caused the deprivation of Peterson's rights.

The majority, like the district court, relies on this court's decision *in Pineda v. City of Houston*, 291 F.3d 325 (5th Cir. 2002), and concludes 27 complaints of excessive force are insufficient to establish a pattern of use of excessive force. It points out that in Pineda 11 incidents of warrantless entry did not support a pattern of unconstitutional warrantless entry because the officers in the 11 incidents reported either consent or exigent circumstances, which was equivocal evidence of Fourth Amendment compliance.

The facts and circumstances in *Pineda* are readily distinguishable. First, in *Pineda*, 291 F.3d at 328, the plaintiff alleged the City of Houston had a custom of permitting warrantless searches of residences. Peterson's alleged custom is much narrower: the use of excessive force in violation of the Fourth Amendment during investigations of "mild crimes," to which the police department's chain of command acquiesces by citing officers for

lesser offenses, exonerating them for use of force, and only mildly disciplining officers who are found to have used excessive force, which amounts to tacit approval of the use of excessive force. Unlike in *Pineda*, where the alleged municipal custom would apply to all warrantless searches in any instance, Peterson's alleged custom focuses on minor crimes, where the chain-of-command ultimately exonerates or finds the claim unsustained or issues only mild discipline when the claim is founded.

Second, Peterson's proffer of evidence concerning the use of excessive force as a City custom consists of more than double the number of quantifiable allegations than were offered in *Pineda*. In *Pineda*, the court reviewed the proffer of 11 alleged incidents, which occurred over a period of more than six years "in one of the Nation's largest cities and police forces." See *Id.* at 329, 331 n.24. Here, Peterson relied on hundreds of pages of reports, which he condensed into his Summary Chart, over a period from 2001 to 2005.[3] This court opined in *Pineda*, however, that relying on previous offense reports could lead to the "practical effect" of "requir[ing] the City to defend 'cases within cases.'" *Id.* at 329. While that may be a "practical effect" sometimes, it is not necessarily the case here.

Here, Peterson alleges not simply that these allegations show a custom of permitting the use of excessive force. Rather, Peterson contends these allegations, gleaned from the numerous reports he

[3] Two incidents described in the summary chart occurred in 2007.

examined, show the City had notice of such violations, which were reviewed by the chain-of-command, evincing a flawed system by which various police officers at different levels of the chain-of-command could not or did not agree on whether excessive force was used, which has led to the acquiescence or condonation of the use of excessive force. Foreclosing the use of such evidence, which might show to the trier of fact that the City has notice of a problem and chooses to look the other way, essentially forecloses municipal liability on a theory of "custom." This is certainly not the result portended by *Monell v. Dept of Social Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

Third, this case is distinguishable from *Pineda* because in addition to producing a quantifiably greater number of incidents[4] to

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[4] Such a distinction is made without considering the relative size of the respective cities and police forces. Obviously, the fact that 27 incidents occurred in a smaller city with a smaller police department undermines the efficacy of relying on *Pineda*.

The majority's supposition "[n]o reasonable jury could conclude based on Peterson's evidence that the City had established a municipal policy of using or condoning excessive force" is undercut by the very fact that this panel has split on the issue of whether Peterson established a question of fact concerning municipal liability for purposes of withstanding summary judgment. "Indeed, the fact that reasonable judges on this court view the evidence differently suggests that these factual disputes [a]re for the jury to resolve." *Thompson v. Connick*, 578 F.3d 293, 314 (5th Cir. 2009) (en banc) (Prado, J., joining).

establish the alleged custom, Peterson offers the police department's own maxim: "If it makes you look good, but it's not in your report, it didn't happen." The City's police officers are taught this idea at the police academy. The obvious corollary is "if something is not reported, it will not impact you [the officer]." The circumstances of *Pineda* do not evidence a similar understanding of withholding information for the purpose of avoiding reprimand or investigation.

Finally, Peterson offers the testimony of Chief Mendoza, who conceded he was the ultimate disciplinarian for police officers in the police department. The district court determined the City did not have a policy permitting the use of excessive force in part based on Chief Mendoza's testimony, when he stated: "I don't believe officers can use force against people without ... there being some reasonable suspicion or probable cause that a crime has been committed or is about to be committed." However, subsequent to stating this opinion, Chief Mendoza readily stated a police officer may legally use force *even if* a police officer does not have a legal right to enter a private residence and make an arrest.

The Record reflects the following exchange between Peterson's counsel and Chief Mendoza during deposition:

Q. (By Ms. Hutchinson) If they didn't have the legal right to be in the apartment and they didn't have the legal right to make an arrest, then

they also didn't have the legal right to use force, correct?

A. No, ma'am.

Q. That's not correct?

A. That's not correct.

The district court dismissed this particular comment as Chief Mendoza's opinion.

Whether Chief Mendoza actually believes the former or the latter of his statements are factual and credibility determinations for the jury. The latter commentary could be construed as the police department policymaker's interpretation of the law on the use of reasonable force.

In *Pineda* there is no indication the chief of police made a statement that resembled the content of Chief Mendoza's statement. A reasonable jury *could* return a verdict in favor of Peterson if it were to find, as a matter of fact, Chief Mendoza believes his latter interpretation of the law complies with the strictures of the Fourth Amendment and he acts in his capacity as chief of the police department on that belief when he reviews excessive force claims. See *Fraire*, 957 F.2d at 1273 ("A dispute about a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.") (footnote omitted).

The majority further relies on dicta from *Pineda*, in which this court stated the size of a police department may be relevant to determining whether a series of incidents can be called a pattern. While this guidance from *Pineda* could be helpful in this case, the fact is there is no evidence in the Record concerning the size of the City's police department. In the City's brief on appeal, it merely argues there were numerous arrests and detentions made over a five-year period. The closest the City comes to revealing how many officers are in its police department is when it stated in its reply in the district court that there were "hundreds of thousands of arrests and detentions made over a five year period by over one thousand (1000) police officers employed by the City." However, the City offered nothing for the Record to support this blanket contention. The absence of any statistical evidence in the Record leaves genuine issues for trial. The number of incidents Peterson offers could be the highest or lowest in cities of a comparable size.

The majority nonetheless concludes the City has demonstrated no genuine issues of material fact regarding a custom condoning the use of excessive force because the majority augments the Record by undertaking its own data search on the City's website.[5] The majority has essentially done what the

[5] The majority's review of the City's website presented the following evidence: "[The City] presently employs more than 1,500 officers, and that there were more than 67,000 incidents of crime in the last year alone." This led the majority to conclude: "[g]iven the department's size, and absent any

City should have endeavored to do in moving for summary judgment and did not do. This is not the court's duty.

The court's task is to review whether Peterson has presented sufficient evidence, not all possible evidence, to create a dispute of material fact concerning whether the City has a custom of condoning excessive force, despite the City's written policies denouncing excessive force. The Record shows 27 allegations of the use of excessive force, which largely were unsustained by a policymaker who believes a police officer may use force to effectuate an arrest/detention, even if there is no legal basis for the arrest/detention. Most critically, the City failed to offer any competent evidence to demonstrate what those 27 incidents mean in light of the number of citizen encounters for a city of comparable size. Hence, there remains a dispute of fact regarding whether the City has a custom of condoning excessive force.

III.

Peterson has presented sufficient evidence to create a dispute of fact regarding whether the

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evidence of its total number of arrests during the same time period, 27 incidents of excessive force over a period of four years do not reflect a pattern that can be said to represent official policy of condoning excessive force so as to hold the City liable for the acts of its employees' unconstitutional conduct." A conclusion based upon evidence not in the Record is simply insufficient to affirm the district court's grant of summary judgment.

City can be held liable on theories of ratification, a failure to train, and a custom of condoning excessive force. Because it is the court's duty to review whether, in resolving all doubts and inferences in a light most favorable to the nonmoving party, Peterson has presented sufficient evidence to create a dispute of material fact regarding the existence of a policy, the district court's decision should be REVERSED, and this case should be REMANDED for trial.

NO. (2)

Supreme Court, U.S.
FILED

09-983 FEB 16 2010

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

KEVIN SCOTT PETERSON
Petitioner

V.

THE CITY OF FORT WORTH, TEXAS
Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the Fifth Circuit

APPENDIX FOR PETITION FOR WRIT OF CERTIORARI
VOL. II

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

KEVIN SCOTT PETERSON	§	
	§	
VS.	§	CIVIL ACTION 4:06-CV-332-Y
	§	U.S. DISTRICT JUDGE
CITY OF FORT WORTH, TEXAS	§	TERRY MEANS

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

This is a case involving allegations of unlawful seizure and excessive use of force by two police officers of the City of Fort Worth, Texas, police department ("FWPD") . Plaintiff Kevin Peterson has sued the City of Fort Worth ("the City") under 42 U.S.C. § 1983 and the Texas Tort Claims Act, section 101.002, et seq., complaining that the City violated his Fourth Amendment rights and is liable for the tortious acts of its police officers. The City has filed a motion (doc. #20) for summary judgment on all of Peterson' s claims. For the reasons stated below, the

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Court concludes that the motion should be GRANTED.[1]

I. Factual Background[2]

In celebration of a friend's birthday, Kevin Peterson and his wife, Jodi, went to a restaurant called Riscky's BBQ on August 14, 2005. The restaurant is located in an area of Fort Worth, Texas, known as the stockyards.[3] They parked their extended-cab pick-up truck in a parking lot near an establishment called Billy Bob's Texas.[4] After

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[1] In his response to the City's summary judgment motion, Plaintiff makes certain objections to the City' s evidence. The Court sustains those objections.

[2] Because the City has moved for summary judgment, the Court will view the facts and draw all reasonable inferences in light most favorable to Plaintiff.

[3] The stockyards is a national historic district in Fort Worth, Texas. The district celebrates Fort Worth' s history as a livestock meet-packing center. It features shopping, dining, a rodeo, and other attractions.

[4] The record is not clear whether the Petersons parked in a parking lot open to the public or whether they parked in an area reserved for individuals who are participants in the rodeo. Kevin Peterson claims he parked where the rodeo participants parked because he was a former rodeo participant and his

dinning, the Petersons walked to a dance club called The Cantina Cadillac. While at the club, Kevin Peterson consumed approximately six to eight beers and his wife Jodi consumed approximately three to four beers. The Petersons arrived at the club around 10:00 p.m. and remained there until it closed at 2:00 a.m.

After The Cantina Cadillac closed, the Peterson's walked back to their pick-up truck. Because of their level of intoxication, the Petersons decided not to drive home, but to sleep in their truck. Kevin Peterson climbed into the back of the truck and lay down to sleep and Jodi Peterson got into the front seat and leaned back to sleep.

Officer Samantha Horner was on patrol when she received a call regarding a suspicious person/vehicle parked near Billy Bob's Texas. She was the primary officer who responded to the call and Officer Roger Ballard was dispatched to assist. They arrived on the scene around 5:00 a.m.

A security guard directed the officers to the Petersons' pickup truck, which was parked back by "the catwalk."[5] As they approached, the officers

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son is currently a rodeo participant. For purposes of this motion, the Court accepts that the Petersons parked in a lot that was not open to public parking.

[5] Officer Ballard states that the pick-up was parked in a dark area and in a place that was not designated for parking, thereby raising his suspicions.

observed a female in the front passenger seat and a male laying in the back seat.[6] The officers identified themselves but did not receive a response from either person.

Officer Horner opened the rear door and shook Kevin Peterson's leg telling him to wake up. When he did not respond, Officer Horner used her ASP baton and gave Kevin Peterson "a sternum rub." Kevin Peterson kicked at officer Horner and told her to leave him alone. Officer Horner explained to Kevin Peterson that she had been called by security and that he needed to wake up, but he went back to sleep.

Officer Horner reached in to wake Kevin Peterson and he swatted at her hand and told her to go away. Officer Horner told Kevin Peterson that she was a police officer and that he did not want to hit her. She further told him that he needed to get out of the truck so she could speak with him. Instead, Kevin Peterson went back to sleep.

Officer Horner then reached in and grabbed Kevin Peterson's arm. Kevin Peterson responded by hitting Officer Horner on her forearm. She informed

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[6] Officer Ballard states that he observed Jodi in the front passenger seat with her pants unbuttoned and pulled down to her mid-thigh region. He said Kevin Peterson was in the rear dressed only in blue jeans; he did not have a shirt on. Officer Horner states that Jodi Peterson's pants were unbuttoned. Jodi Peterson denies that her pants were unbuttoned or pulled down to her mid-thigh region, and Kevin Peterson denies being shirtless.

Officer Ballard that she' d just been hit and he came over to the passenger side to assist her in removing Kevin Peterson from the truck.[7]

According to Kevin Peterson:

> The first thing I remember upon waking up was I was being drug out of the truck by my clothes. I was laying on my back. I actually hit the ground. The door was opened, and they drug me out. I was sliding on my back on the ground; and I had two police officers on me wrestling me to the ground . . . . And then they rolled me over and put my hands behind my back and put cuffs on me.
>
> ...
>
> At that point I didn't know what was going on or who they were because nobody said... this is the police or anything.

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[7] Officer Ballard states that Officer Horner shook Kevin Peterson's legs and he began to stir and kick his feet. He states that Officer Horner identified herself as a police officer and ordered Kevin Peterson to stop kicking. Officer Ballard said that Kevin Peterson continued to kick and kicked Officer Horner in the chest. He states that Officer Horner stepped back to avoid being kicked again and he stepped into the doorway and ordered Kevin Peterson to stop kicking. When he continued, Officer Ballard states he reached in, grabbed Kevin Peterson by his belt and pulled him from the truck.

(Pl.'s App. at 144-45.) After being handcuffed, Kevin Peterson said they stood him up. He recounted,

> They grabbed . . . the cuffs by the chain and... pulled me up. I was face down, and they pulled me up by my arms [and] my hands ....They just jerked me up off the ground and...spun me around [and] slammed me up against the bed of the truck . . . . [T]here wasn' t any struggle with me . . . . I'm waking up and becoming more aware . . . . [T]here was a woman on the right and a man on my left. He had his hands on my shoulders . . . and she had her hands on me, too.
>
> And I noticed hey, these are cops . . . . So that was the first time when I got to my feet that I knew that I was being cuffed by police officers . . . . I didn't say anything at this point.

(*Id.* at 145.) Kevin Peterson continued,

> I was being cussed by the male officer . ..The male officer was screaming in my ear. He was on my left, and he was saying you motherfucker. And he reared

> back and kneed me in the thigh with his knee . . . [W]hen he did it, I cringed. I go ugh, . . . and I was . . . immediately enraged because it was totally unnecessary for him to beat on me when I was in cuffs.

(*Id.* at 146.) Kevin Peterson stated that Officer Ballard took his billfold out of his pocket and took out his driver's license. He explained,

> [W]hile he was looking for my license . . . , the woman cop opened . . . the front seat door where Jodi was sleeping and woke her up....
> [S]he said Ma'am, is this your husband; and Jodi said yes. So Jodi is coming around [and]... the lady officer tells her to stay seated, so she sits down in the truck . . . in the passenger seat. And the whole time my leg's . . . pounding . . .
>
> [T]he male officer takes my driver's license to his car, runs [it] and doesn't find any warrants or anything wrong where he can haul me to jail. So he brings back my license and puts it in my billfold, leaves my billfold sitting up on my truck,

> uncuffs me, and they get in their cars and leave.

(Id.)

Because they felt they were still too intoxicated to drive, the Petersons got back in their truck and stayed at the parking lot until around 7:00 a.m. Thereafter, the Petersons drove home and Kevin Peterson planned on laying in bed until the pain in his leg subsided. But after he took his jeans off, Kevin Peterson realized that he needed to go to the hospital. At the hospital, the doctors diagnosed Kevin Peterson with a ruptured femoral artery and he underwent two surgeries. He stayed in the hospital for nearly two weeks recovering from his injury and surgeries. Kevin Peterson contends that Officer Ballard's hard knee strike to his thigh ruptured his femoral artery."

" Officer Ballard denies giving a knee strike to Kevin Peterson's thigh and he denies using any abusive language. Officer Horner, however, states that Officer Ballard did give Kevin Peterson a knee strike. She describes the knee strike as "an approved distraction technique" Officer Ballard used so that he could secure Peterson and prevent his continued resistence. (Pl.'s App. at 121.) Officer Ballard, on the other hand, described Kevin Peterson's resistence as minimal and denied that a knee strike was used or even necessary. He further states that after waking and becoming alert to his surroundings, Kevin Peterson apologized for striking Officer Horner. Officer Ballard claims that the two of them had a cordial conversation for about fifteen minutes where Kevin Peterson recounted his and dodi' s decision to sleep in their truck because they felt to intoxicated to drive. Officer Ballard states that he told Kevin Peterson that he appreciated their decision not to drink and drive and he allowed them to return to their truck to go back to sleep.

II. Analysis

A. Summary Judgment Standard

When the record establishes "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law," summary judgment is appropriate. FED. R. CIV. P. 56(c). An issue is considered "genuine" if "it is real and substantial as opposed to merely formal, pretended, or a sham." *Bazan v. Hidalgo Cty.*, 246 F.3d 481, 489 (5th Cir. 2001) (citing *Wilkinson v. Powell*, 149 F.2d 335, 337 (5 Cir. 1945)) Facts are considered "material" if they "might affect the outcome of the suit under governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) . To determine whether there are any genuine issues of material fact, the Court must first consult the applicable substantive law to ascertain what factual issues are material. *Lavespere v. Niagra Mach. & Tool Works*, 910 F.2d 167, 178 (5th Cir. 1990) Next, the Court must review the evidence on those issues, viewing the facts in the light most favorable to the nonmoving party. *Id.*; *Newell v. Oxford Mgmt. Inc.*, 912 F.2d 793, 795 (5th Cir. 1990); *Medlin v. Palmer*, 874 F.2 1085, 1089 (5th Cir. 1989) . In making its determination on the motion, the Court must look at the full record including the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. See FED. R. CIV.

p. 56(c); *Williams v. Adams*, 836 F. 2d 958, 961 (5th Cir. 1988) . Rule 56, however, "does not impose on the district court a duty to sift through the record in search of evidence to support" a party' s motion for, or opposition to, summary judgment. *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915-16 & n.7 (5th Cir. 1992) . Thus, parties should "identify specific evidence in the record, and . . . articulate" precisely how that evidence supports their claims. *Forsyth v. Barr*, 19 F.3d 1527, 1536 (5th Cir. 1994) Further, the Court' s function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. See *Anderson*, 477 U.s. at 249.

To prevail on a summary-judgment motion, the moving party has the initial burden of demonstrating that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. See *Celotex Corp v. Catrett*, 477 U.S. 317, 323 (1986). A defendant moving for summary judgment may submit evidence that negates a material element of the plaintiff's claim or show that there is no evidence to support an essential element of the plaintiff's claim. See *Celotex Corp.*, 477 U.S. at 322-24; *Crescent Towing and Salvage Co. v. M/V Anax*, 40 F.3d 741, 744 (5th Cir. 1994); *Lavespere*, 910 F.2d at 178.

To negate a material element of the plaintiff's claim, the defendant must negate an element that would affect the outcome of the action. See *Anderson*, 477 U.s. at 247. If the defendant moves for summary judgment alleging no evidence to support

an essential element of the plaintiff's claim, the defendant need not produce evidence showing the absence of a genuine issue of fact on that essential element. Rather, the defendant need only show that the plaintiff, who bears the burden of proof, has adduced no evidence to support an essential element of his case. See *Celotex*, 477 U.S. at 325; *Teply v. Mobil Oil Corp.*, 859 F.2d 375, 379 (5th Cir. 1988)

When the moving party has carried its summary judgment burden, the respondent must go beyond the pleadings and by his own evidence set forth specific facts showing there is a genuine issue for trial. *Arbaugh v. Y&H Corp.*, 380 F.3d 219, 222 (5th Cir. 2004) (citing *Celotex*, 477 U.S. at 324) ; see also FED. R. CIV. P. 56(e). This burden is not satisfied by creating some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence. See *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) . If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. See *Anderson*, 477 U.S. at 249-50.

B. Standard for Municipal Liability

"It is clear that a municipality may not be held liable under section 1983 on the basis of respondeat superior." *Johnson v. Nacogdoches County*, et al., 379 F. 3d 293, 308 (5th Cir. 2004); *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978) To establish municipal liability under section 1983, a

plaintiff must prove three elements: (1) a policy (2) of the municipal's policymaker (3) that is the moving force behind a violation of a constitutional right. *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001); *Monell*, 436 U.s. at 694.

First, a plaintiff must identify an official policy of the municipality. Municipal policy encompasses a wide range of behavior, and for purposes of section 1983 liability, may consist of:

1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officer or by an official to whom the lawmakers have delegated policy-making authority; or

2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority.

Nacogdoches County, 379 F.3d at 309; *Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir. 1992).

Next, a plaintiff must establish that the identified policy came from a policymaker of the municipality. "A policy or custom becomes official for purposes of § 1983 when it results from the decision

or acquiescence of the municipal officer or body with 'final policymaking authority' over the subject matter of the offending policy." *Gros v. City of Grand Prairie*, 181 F.3d 613, 615 (5th Cir. 1999). Because a municipality cannot be held vicariously liable for the constitutional torts of its employees or agents under section 1983, the official policy requirement was established

> to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible. Monell reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts "of the municipality" - that is, acts which the municipality has officially sanctioned or ordered.

Pembaur v. City of Cincinnati, 475 U.S. 469, 479 (1986).

Finally, a plaintiff must prove that the municipality's official policy was the driving force behind the constitutional violation. This means that there must exist a direct causal connection between the municipal policy and the constitutional deprivation, and this connection must be more than mere "but for" causation. *Piotrowski*, 237 F.3d at 580;

Fraire v. City of Arlington, 957 F.2d 1268, 1281 (5th Cir. 1992). Causation can be established by a plaintiff's showing that the policy or custom itself violated federal law or authorized or directed the deprivation of federal rights, or, that the policy or custom was adopted or maintained by the municipality's policymakers with deliberate indifference as to its known or obvious consequences. *Nacogdoches County*, 379 F.3d at 309; *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397, 406-07 (1997). The Supreme Court has made clear that "'deliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Bryan County*, 520 U.s. at 410. And deliberate indifference is more than mere negligence, for "simple or even heightened negligence will not suffice." *Id.* at 407; *Conner v. Travis County*, et al., 209 F.3d 794, 796 (5th Cir. 2000).

> These requirements must not be diluted, for "where a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into respondeat superior liability."

Snyder v. Trepagnier, 142 F.3d 791, 796 (5th Cir. 1998) (quoting *Bryan County*, 520 U.S. at 415).

C. Discussion

1. Violation of Plaintiff's Constitutional Rights

As a threshold matter, the Court must first consider whether the alleged facts, taken in light most favorable to Peterson, establish that the officers violated Peterson's Fourth Amendment Rights. If the facts viewed in light most favorable to Peterson fail to show that Peterson suffered any constitutional deprivation, the City would be entitled to summary judgment on his section 1983 claim. See *Price v. Roark*, 256 F.3d 364, 369 (5th Cir. 2001) Peterson claims two constitutional deprivations under the Fourth Amendment: unlawful detention and the excessive use of force. The Court will review each in turn.

a. Unlawful Detention

Peterson argues that Officers Horner and Ballard had no reasonable basis to enter his truck and seize him. Conversely, the City contends that "there was never an illegal detention because the officers had a right to approach the vehicle and ask questions, whether Peterson intended to answer or not." (Def.'s Br. at 5.) The City contends, "When Peterson and his wife did not respond to the attempts to wake them up, the officers had a duty to open the car door to check on them under their community-caretaking function." (*Id.*) The City continues, "[W]hen Peterson struck Officer Horner, she had reasonable suspicion to detain for the purpose of investigating an assault on a police officer." (*Id.* at 5-6.)

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It is well settled that not all encounters with the police implicate the Fourth Amendment. See *Florida v. Bostick*, 501 U.S. 429, 434 (1991) . "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may [a court] conclude that a 'seizure' has occurred." *Terry v. Ohio*, 392 U.S. 1, 19, n.16 (1968) . Here, the evidence viewed in light most favorable to Peterson establishes that the Petersons were not free to leave until after Officers Horner and Ballard had completed their investigation and released them. Thus, Kevin Peterson's encounter with Officers Horner and Ballard resulted in his temporary seizure and implicates the Fourth Amendment.

The Fourth Amendment provides,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

U. S. CONST. AMEND. IV. This case does not involve police conduct subject to the warrant clause of the Fourth Amendment. Instead, the police conduct at issue here involves the "necessary swift action

predicated upon the on-the-spot observations of the officer[s] on the beat---which historically has not been, and as a practical matter could not be, subjected to the warrant procedure." *Terry*, 392 U.S. at 20. Thus, "this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." *Id.*

"The ultimate standard set forth in the Fourth Amendment is reasonableness." *Cady v. Dombrowski*, 413 U.S. 433, 440 (1973). In assessing the reasonableness of a seizure, the Court must first focus on the governmental interest that allegedly justifies the official intrusion upon the constitutionally protected interests of the citizen and balance that need against the invasion that the seizure entails. *Terry*, 392 U.S. at 21-22. A seizure under the Fourth Amendment must be objectively reasonable in light of the circumstances peculiar to the case. *Whren v. United States*, 517 U.S. 806, 813 (1996). Constitutional reasonableness is not "based on the actual motivations of individual officers . . . ." *Id.*

The police may stop and temporarily seize a person based on probable cause, reasonable suspicion, or as part of the police's community-caretaking functions. See *Whren*, 517 U.S. at 818; *Terry*, 392 U.S. at 21-23; *Cady*, 413 U.S. at 447. The Supreme Court has recognized that "local police officers . . . frequently...engage in what . . . may be described as community- caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a

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criminal statute." *Cady*, 413 U.S. at 441. Indeed police officers are not only authorized, but are expected to exercise this communitycaretaking function. "In the course of exercising this nonInvestigatory function, a police officer may have occasion to seize a person, as the Supreme Court has defined the term for Fourth Amendment purposes, in order to ensure the safety of the public and/or the individual, regardless of any suspected criminal activity." *United States v. King*, 990 F.2d 1552, 1560 (10th Cir. 1993) (citing *United States v. Rideau*, 949 F.2d 718, 720 (5th Cir. 1991) (officers stopped defendant for his own safety and safety of others after observing him standing in middle of road at night, in dark clothes, and apparently intoxicated) *vacated on other grounds*, 969 F.2d 1572 (en banc) (agreeing with panel on this point)).

But whether a temporary seizure is based on probable cause, reasonable suspicion, or for a reason that is "wholly unrelated to the desire to prosecute for crime," *Terry*, 392 U.S. at 13, the objective-reasonableness inquiry of a court does not change. Thus,

> in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the

> Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate?

Terry, 392 U.S. at 21-22. The scope of the intrusion "must be strictly tied to and justified by the circumstances [that] rendered its initiation permissible." *Id.* at 19.[9]

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[9] The Court recognizes that in *Corbin v. Texas*, 85 S.W.3d 272, 277 (Tex. Crim. App. 2002), the Texas appellate court held that "a police officer may not properly invoke his community caretaking function if he is primarily motivated by a non-community caretaking purpose." The Court disagrees with *Corbin*. As discussed above, the Supreme Court has steadfastly held that the subjective motivations of an officer will not defeat a search or seizure that is objectively reasonable under the circumstances of a particular case. See *Georgia v.*

Here, the officers were called to the scene on a report of a suspicious truck parked in a dark area of a lot that was not open to the public for parking. The caller also reported two suspicious persons in the vehicle and there is evidence in the record that suggests the officers were informed that the caller was concerned for the persons' well being. At this point, Officers Horner and Ballard not only had authority to respond and investigate, they had a duty to do so. Thus, Officers Horner and Ballard had the authority to approach the Petersons' truck and investigate the call.

When they approached, they noticed two individuals in the truck that appeared to be unconscious. Officer Ballard stated that his first concern was to make sure that the Petersons were alright. (Pl.'s App. at 15.) The officers' testimonies reveal that the Petersons did not respond to the officers' repeated verbal attempts to wake them up. According to Officer Ballard, "[W]e didn't know if either one or two of them were simply intoxicated or had been hit in the head and left there, robbed . . . [W]e just didn' t know until we made contact." (*Id.* at 13.)

Randolph, 547 U.s. 103, 138 (2006) ("This Court has rejected subjective motivations of police officers in assessing Fourth Amendment questions...). Indeed, the Supreme Court in both *Terry* and *Cady* recognized that police officers may conduct a search or seizure for reasons wholly unrelated to the investigation of criminal activity. Nevertheless, the inquiry has remained the same: whether the search or seizure was objectively reasonable irrespective of the subjective motivations of the officer for conducting the search or seizure.

Peterson places great weight on the fact that "the two officers . . . can' t even agree upon the alleged basis for entering the vehicle and contacting Kevin." (Pl.'s Br. at 11.) He points out that Officer Ballard said he suspected the crimes of assault and public intoxication while Officer Horner said she suspected trespassing and possible intoxication. Regardless of those purported bases, Peterson argues that it was objectively unreasonable for the officers to make contact and briefly detain him because "there were no signs posted warning of trespass, . . . the parking was in a public area . . . where people often slept overnight, . . . there were no weapons visible, [and] . . . there was no evidence of wounds, a struggle or a fight . . . ." (*Id.* at 12.)

Peterson fails to address, however, the officers' articulated concerns for ensuring the Petersons' well being. Until the officers were able to wake the Petersons and briefly question them, it was unclear whether they were just sleeping or were in need of assistance. Just because there were no signs in plain view of foul play does not mean the Petersons could not have been the victims of a crime. Further, the Petersons could have been suffering from alcoholic poisoning. Based on an objective view, it was reasonable for the officers to further investigate into the Petersons' well being when the Petersons failed to respond to the officers' verbal attempts to wake them. The Court has no doubt that had the officers failed to inquire into the Petersons' well being and it turned out that the Petersons were in need of assistance, the Petersons

would have demanded that the officers be disciplined for dereliction of duty. Thus, the Court concludes that Peterson's brief detention by the officers did not violate his Fourth Amendment right against unreasonable seizures.

b. Excessive Use Of Force

Turning now to Peterson" s excessive-use-of-force claim, Peterson argues the officers used excessive force when they forcibly removed him from the truck and when Officer Ballard delivered a knee strike to Peterson's thigh. It is well settled that the excessive use of force in effectuating an arrest or even a brief *Terry*-type investigatory detention violates the Fourth Amendment. See *Graham v. Connor*, 490 U.S. 386, 394-95 (1989); *Ikerd v. Blair*, 101 F.3d 430, 433 (5th Cir. 1996). To "state a claim for excessive force in violation of the Constitution, a plaintiff must allege (1) an injury, which (2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was (3) objectively unreason- able." *Ikerd*, 101 F.3d at 433-34 (internal quotations and citations omitted)

Peterson has alleged that the ruptured femoral artery in his thigh resulted directly and only from Officer Ballard' s knee strike. For purposes of its summary-judgment motion, the City has conceded that Officer Ballard did in fact strike Peterson in the thigh with his knee. (Def.'s Br. at 8.) The City's argument is that the officers' use of force

was reasonable under the totality of the circumstances.[10]

"Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham*, 490 U.S. at 396. In deciding whether the force used was reasonable, the Court undertakes a similar balancing to that used in determining whether a search or seizure was reasonable under the Fourth Amendment. *Id.*

> Determining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake . . . . Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, . . . its proper application requires careful attention to the facts and circumstances of each particular

[10] The City does not address whether Peterson's injury resulted directly and only from Officer Ballard's knee strike in its summary-judgment motion. Thus, for purposes of this motion, the Court will consider that element conceded.

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> case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight . The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight...

Id. at 396-97 (internal quotations and citations omitted). The inquiry is an objective one. *Id.* at 397. And the crucial question is

> whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.... An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.

Id. Here, the Court concludes that the officers' actions were objectively reasonable.

Even when viewed in light most favorable to Peterson, the evidence shows that Peterson was initially combative and resisted the officers' attempts to briefly detain and question him. The officers were faced with a situation of not knowing why two individuals were unconscious in a vehicle parked in a dark area of a lot, while out in the open, not open to the general public for parking. The circumstances objectively reveal that the officers needed to make contact with the Petersons to dispel any possible suspicious activity and to ascertain their well being. The government interest here justifies a brief detention and the use of force necessary to effect the detention.

According to Officer Horner, when she woke Peterson, he began to kick at her such that she had to move away to avoid being hit. Officer Ballard recounts Peterson's kicking Officer Horner in the chest. She continually identified herself as a police officer and informed Peterson that he needed to get out of the truck so that the officers could speak with him. Instead, Peterson ignored her commands and attempted to go back to sleep. When she reached in again to prevent him from going back to sleep, Peterson struck Officer Horner on her forearm. It was at this point, according to Officer Horner, that Officer Ballard came over to assist her in forcibly removing Peterson from the truck. Officer Ballard

states that he reached in, grabbed Peterson by his belt and arm and dragged him out of the truck.[11]

Even after being forcibly removed from the truck, Peterson continued to resist. Officer Ballard states that Peterson struggled to escape his grasp and tried to turn to face Officer Ballard. According to Officer Ballard, "Once we had him out of the truck, that' s when he still continued to fail to comply. He wouldn't stand still. He was pulling away from us . . . . He [took] an aggressive stance toward us and [did] not [comply] to what we're asking him to do. (Def.'s App. at 28-29.) Faced with a belligerent individual whom Officer Ballard knew had been drinking (Officer Ballard testified that he could smell alcohol), he resorted to his training and delivered a strike to Peterson's thigh with his knee to get Peterson to stop resisting.

Peterson offers very little evidence regarding his resistence. He states,

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[11] Peterson claims that the officers never identified themselves and that it was not until after being cuffed he realized that it was police officers who had removed him from his truck. But Peterson also states that he did not know they were police officers because he had just awakened when he was being removed from his truck. He also states that after being awakened, he was confused and did not know why this was happening to him. Based on this testimony from Peterson, the Court concludes that he is not in a position to contradict the officers' assertions that they repeatedly identified themselves to him to no avail.

I can't recall putting up any resistance; but I was being attacked by two people. I didn't know they were police officers, because I just woke up when they drug me out of the truck. So I might have been--I know I was confused, and I didn't know why I was being attacked. I was on the ground. I had two people on me... Is it possible I struggled? I don't see much of--there wasn't much of a struggle...from me . . . because . . . I woke up being drug out of the truck and hit the ground. It happened so fast there wasn' t any time to struggle. I was rolled over on my stomach, and both officers had my arms behind my back; and they put cuffs on me . . . . And one of them, I believe it was the man, had his knee on my neck . . . when they rolled me over. He had his knee on my neck, and both of them pried my arms behind my back with brute force and put cuffs on me. And one of them was sitting on my back, and the other one had his knee on my neck grinding my face . . . . I couldn't do anything. I don't think I struggled. There wasn't any time

> to struggle. I thought I was being attacked.

(Pl.' s App. at 145.) At best, Peterson is equivocal. He states he cannot remember if he struggled, but claims he remembers very clearly every bit of force the officers used to detain him. He states that he doesn't think he struggled, but he then goes on to state that he thought he was being attacked; and he describes conduct on the part of officers that normally occurs only when a subject is resisting and posing a threat to the officers' safety. And he never unequivocally denies struggling, but tries to claim that he couldn't have because everything happened so fast. Thus, the Court concludes that there is no genuine issue of material fact as to whether Peterson was violent towards the officers and actively resisted their efforts to detain him briefly for questioning.

The question now becomes whether the officers' use of force was a reasonable response to Peterson's belligerence. The Court is mindful that Peterson suffered a severe injury that may have resulted from Officer Ballard' s knee strike to Peterson' s thigh. Peterson, however, has not presented any evidence to the Court showing that the officers or the City were aware that a knee strike to a person's thigh could potentially cause such a severe injury. Under the Fort Worth Police Department's guidelines, a knee strike is considered an intermediate use of force and not the deadly use of force or a technique that could cause serious injury. Thus, although Peterson suffered a severe injury that may have resulted from Officer Ballard' s

use of the knee strike, that injury will not color the Court's analysis as to the reasonableness of the use of that technique. To allow such an influence would bias the objective review of the officer's use of force with 20/20 hindsight.[12]

Under the circumstances of this case, and resisting the temptations of 20/20 hindsight, the Court concludes that the officers use of force was not excessive. The evidence shows that the officers were aware that Peterson had been drinking. It also shows that Peterson had struck one of the officers and aggressively resisted their attempts to detain him. It is clear that Peterson' s belligerence posed an immediate threat to the safety of the officers, and their conduct and use of force was a reasonable response to that threat.

According to the police department's guidelines, this level of force is appropriate "when the officer meets an actively resisting subject who represents a physical threat to the safety of the officer or attempts to use force against the officer or another but does not yet represent a life-endangering threat." (Def.' s App. at 49.) Faced with just such a situation, the officers used the appropriate level of force to protect their safety and minimize Peterson's potential threat. Even if it could be said, after the fact, that Peterson may not have posed a significant threat because he was simply unaware of his surroundings after

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[12] Conversely, an officer shooting a suspect to prevent flight or in selfdefense would be considered the deadly use of force even if, after the fact, the suspect was not killed.

being awakened from a deep sleep, or that this use of force may not have been necessary because he had been handcuffed, the Supreme Court has admonished that not every use of force, even if later it turns out to be unnecessary, will violate the Fourth Amendment.

> With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers . . . violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation.

Graham, 490 U.S. at 397. Accordingly, the Court concludes that summary judgment is appropriate. Peterson has failed to raise a genuine issue of material fact as to whether his encounter with Officers Horner and Ballard involved the use of force excessive to the need and, thus, resulted in a violation of his Fourth Amendment rights.[13]

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[13] The Court recognizes that Officer Ballard testified that he did not strike Peterson in the thigh with his knee and that Officer

2. Municipal Liability

Even assuming the officers violated Peterson's Fourth Amendment rights, summary judgment is still appropriate because Peterson fails to establish that a genuine issue of material fact exists as to whether a policy, practice, or custom of the City was the moving force behind his constitutional violation. Boiled down, Peterson's claim against the City amounts to nothing more than respondeat superior liability for the actions of Officers Horner and Ballard.

a. Official Policy

Peterson fails to point to any policy of the City that was the moving force behind the conduct of the officers. At the time of the incident, the FWPD had the following policies in place regarding the use of force and detention:

Ballard believed that the use of such force under these circumstances would have been excessive. It is not clear from Officer Ballard's testimony, however, whether his opinion was based on 20/20 hindsight. Notwithstanding Officer Ballard's opinion to the contrary, the Court concludes that under the circumstances of this case, the use of force here, including the knee strike, was not unreasonable. It should also be noted that Deputy Chief R.M. Manning opined, "While there is no conclusive evidence a knee strike was delivered by Officer Ballard, it appears from the details he would have been justified in using that amount of force." (Pl.' s App. at 348.) Neither opinion influenced the Court's decison.

The use of force under specified circumstances is permitted by law and is an affirmative duty and responsibility of police officers. However, the unnecessary or excessive use of force is contrary to law, places the representative government agency in a position of civil liability, and the officer in jeopardy of civil and criminal liability and disciplinary action. Unnecessary or excessive use of force is therefore prohibited by this department.

...

Necessary force is defined as the minimum amount of lawful force necessary to achieve a legitimate police objective.

...

Under no circumstances will the force used by an officer be greater than necessary to achieve legitimate police objectives, nor will the force be used longer than necessary to subdue the suspect, and deadly force shall not be used except as specifically provided in this directive.

...

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Force shall not be used with the intent or purpose to punish, injure, or kill. Force shall only be used to prevent an individual from completing an act and effecting an arrest, and then, only the minimum amount of force necessary shall be used.

...

All use of force incidents [that] result in injury, involve the use of a chemical agent, or any use of force incident during which the level used is hard open-hand control and restraint or greater shall be reported and identified as "Use of Force by an Officer."

...

No officer shall falsely arrest, imprison, or cause any malicious prosecution to be instituted against any person.

...

No officer shall arrest any person or search any premises or persons except with a warrant of arrest, search warrant, or where such arrest or search is authorized without a warrant by law.

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(Def.'s App. at 46-50.) These official policies have been published by the FWPD and have been distributed to the officers in the department. The evidence also shows that the officers have received and continue to receive training on the Department's policies regarding the appropriate use of force arid when detention is authorized.

In an effort to show that the FWPD had an official policy allowing for the excessive use of force, Peterson draws the Court's attention to Fort Worth Chief of Police Ralph Mendoza's deposition testimony. According to Peterson, Chief Mendoza, who is the policymaker for the FWPD, opined that "a police officer may use force to effectuate a detention/arrest even if there was no legal basis for the detention/arrest." (Pl.'s Br. at 10.) But that statement reflects his opinion and does not reflect an official policy of the FWPD. Opinions of a policymaker are not per se official policies. There must be some evidence that the policymaker's opinion was meant to reflect official policy or was promulgated as an official policy.

A review of Chief Mendoza's testimony, however, reveals that he did not testify that the FWPD had an official policy allowing police officers to use force to effectuate an illegal arrest or detention. Quite the opposite; Chief Mendoza testified: "I don't believe officers can use force against people without . . . there being some reasonable suspicion or probable cause that a crime has been committed or is about to be committed." (Pl.'s App.

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at 186.) Thus, the Court concludes that Peterson has failed to present a genuine issue of material fact that the City had an official policy that was the moving force behind his constitutional violations.

b. Official Practice Or Custom

Peterson argues that "a pattern of excessive force" exists in the FWPD and that "this pattern of conduct put the City . . . on notice that there was a problem with use of excessive force on the part of its police officers." (Pl.'s Br. at 15, 18.) According to Peterson, "In response to a discovery request asking for other complaints of excessive force in a five year time frame, the City ...produced boxes of internal affairs documents reflecting investigations of complaints of excessive force." (*Id.* at 15.) After attempting to "cull them down to a manageable amount of paper," Peterson states that he "was still faced with filing an approximately 900-page appendix." (*Id.*) But notwithstanding the numerous internal-affairs documents, Peterson has produced twentyseven investigations of excessive force during the previous five years and "out of [the twenty-seven] investigations, excessive force was sustained on approximately four occasions." (*Id.* at 16.) Thus, Peterson concludes that "the use of excessive force by Fort Worth police officers is so common and well settled as to constitute a custom that fairly represents municipal policy." (*Id.* at 18.)

The Court first notes that "one act is not itself a custom. There must be a persistent and widespread practice." *Pineda v. City of Houston*, 291 F.3d 325,

329 (5th Cir. 2002) (internal quotations and citations omitted). "That is, the existence of a persistent pattern of illegal conduct, tolerated by municipal policymakers, tends to show that the subject conduct does not represent an unauthorized departure from lawful policy but instead represents the realization of an unlawful policy." *Milam v. City of San Antonio*, 113 Fed. Appx. 622, 625 (5th Cir. 2004).

Pineda dealt with Houston police officers who shot and killed an individual following an unconstitutional warrantless entry into his residence. *Id.* at 327. The city produced 5000 offense reports and out of that, counsel selected 500 reports involving narcotics offenses. *Id.* at 329. Out of these 500 narcotics-offense reports, eleven of the reports memorialized a warrantless entry into a residence. *Id.* It was held that eleven incidents "cannot support a pattern of illegality in one of the nation's largest cities and police forces." *Id.*

The same is true here. While the City of Fort Worth and its police department are not as large as Houston, it is still a sizable city and police department nonetheless. Out of the boxes of internal-affairs documents reflecting investigations into police conduct over a five-year period that Peterson himself concedes was over 900 pages, he produced twenty-seven investigations regarding excessive use of force. Only four determined that excessive use force was used. That hardly amounts to a persistent and widespread practice necessary to say that the City had an unwritten custom of permitting or sanctioning the excessive use of force. See Pineda,

291 F.3d at 329. In fact, it demonstrates the opposite; that those incidents of excessive use of force represented a departure from the FWPD' s lawful policies. [14]Thus, the Court concludes that Peterson has failed to establish a genuine issue of material fact that the use of excessive force by Fort Worth police officers is so common and widespread as to constitute a custom that fairly represents a policy of the City.

c. Ratification

Peterson argues that the City "has specifically ratified the conduct of Officer Ballard and Officer Horner." (Pl.'s Br. at 19.) Peterson points out that the conduct of the officers in this case was the subject of an internal-affairs investigation. The investigation was reviewed by the officers' chain of command and ultimately by Chief Mendoza. After reviewing the investigation, Chief Mendoza concluded that the officers acted in compliance with the FWPD' s policies and procedures and that neither officer needed to be disciplined. Therefore, Peterson argues the City should be held liable because the City's policymaker ratified the officers' unconstitutional conduct.

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[14] While the Court has not been provided with any evidence as to how many arrests, detentions, or police encounters with citizens occurred over the past five years, the Court has no doubt that it must number in the tens of thousands.

Thus, eleven complaints and four sustained incidents of excessive force can hardly be said to represent a persistent and widespread problem.

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The ratification theory of municipal liability has been recognized by the Supreme Court. *City of St. Louis v. Praprotnik*, 485 U.s. 112, 127 (1988). There the high court stated:

> When a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with their policies. If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final.

Id. (emphasis in original). The ratification theory is commonly employed in the employment context. "For example, if a school board, a policymaker..., approves a superintendent's decision to transfer an outspoken teacher, knowing of the superintendent's retaliatory motive for doing so, the government entity itself may be liable; but if the school board lacks such awareness of the basis for the decision, it has not ratified the illegality and so the district itself is not liable." *Milam,* 113 Fed. Appx. at 626.

Regardless of the context in which it is raised, the ratification theory "is necessarily cabined in several ways . . . to prevent the . . . theory from

becoming a theory of *respondeat superior* . . . ." *Id.* at 627. The mere failure to investigate a subordinate's decision does not amount to ratification. *Id.* And policymakers who simply go along with a subordinate's decision do not thereby vest final policymaking authority in the subordinate. *Id.* The ratification theory must be applied with the understanding that "policymakers alone can create municipal liability, and so any violation must be causally traceable to them, not just to their subordinates." *Id.* Applying the ratification theory here as proposed by Peterson would turn it into de facto *respondeat superior*.

While the mere failure to investigate a police officer's conduct that allegedly violated a person's Fourth Amendment rights cannot amount to ratification, the converse must also be true: the mere decision to investigate and exonerate also cannot amount to ratification. In the example mentioned above, a school board approved, or ratified, with full knowledge, its subordinate's decision to commit an act that violates a person's constitutional rights. Because the school board acted with full knowledge and approved the conduct **to be perpetrated by the school board's subordinate,** it can not only be said that the school board ratified such conduct, but that it was complicit. That makes the constitutional violation traceable to the policymaker.

Here, the policymaker, the chief of police, was reviewing the conduct of his officers that had already occurred, without his knowledge or prior approval. Although Chief Mendoza approved of the officers'

conduct, he did so **after the fact** and thus it cannot be said that the officers' conduct is traceable to Chief Mendoza. To hold the City liable because Chief Mendoza concluded that the officers acted appropriately would convert liability through ratification into *respondeat-superior* liability. *Cf. Milam*, 113 Fed. Appx. at 627 ("It is not an easy fit because, at least facially, an illegal arrest that is completed without the involvement of any policymaker does not look like the typical situation in which a policymaker could approve the employee's decision and the basis for it such that municipal policy can be said to have caused the harm.") (Internal quotations and citations omitted.) Thus, the Court concludes that Peterson has failed to establish a genuine issue of material fact that the City ratified the officers' conduct.

d. Failure To Train

Peterson argues that the City was deliberately indifferent to the need for further training on the excessive use of force. In particular, Peterson complains that there has been no training on the possible injuries that could result from a knee strike. Peterson contends that Officer Ballard testified that he did not "recall being told that there was any risk of injury from a knee strike" and that he stated that "had he had appropriate training indicating the possible ramifications of using a knee strike, that ...would make a difference in his evaluation of his use of force." (Pl.'s Br. at 21.)

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Peterson does not offer any evidence that the City or the FWPD were aware that injuries such as that suffered by Peterson could occur from a knee strike and that training was necessary to prevent such an injury from occurring in the future. Instead, Peterson argues, "The need for further training relating to the use of force in the [FWPD] is apparent from the records reflecting instances of complaints of excessive force by Fort Worth officers." (*Id.*) None of those records, however, reflect a severe injury resulting from a knee strike. That notwithstanding, Peterson contends that the City was deliberately indifferent to the need for further training.

"It is clear that a municipality's policy of failing to train its police officers can give rise to [section] 1983 liability." *Brown v. Bryan County*, 219 F.3d 450, 457 (5th Cir. 2000) . To establish a city's liability under the failure-to-train theory, a plaintiff must show (1) inadequate training procedures; (2) that inadequate training caused the constitutional deprivation; and (3) the city's policymakers were deliberately indifferent to the need for training. *Pineda*, 291 F.3d at 332. As will be explained below, Peterson has failed to raise a genuine issue of material fact as to inadequate training and deliberate indifference.

The evidence establishes that Fort Worth police officers go through extensive training on the use of force at the police academy before becoming a police officer. The evidence also establishes that every two years police officers go through forty additional hours of continuing training that

includes training on the use of force. And the evidence establishes that police officers are regularly updated on the law concerning the use of force.

> In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city "could have done" to prevent the unfortunate incident. Thus, permitting cases against cities for their "failure to train" employees to go forward under § 1983 on a lesser standard of fault would result in *de facto respondeat superior* liability on municipalities-a result we rejected in *Monell* . . . . It would also engage the federal courts in an endless exercise of second-guessing municipal employee training programs. This is an exercise we believe the federal courts are ill suited to undertake, as well as one that would implicate serious questions of federalism.

City of Canton, Ohio, v. Harris et al., 489 U.s. 378, 392 (1989). Following the Supreme Court' s admonition here, the Court is reluctant to second-guess the training the FWPD gives to its police

officers. This is especially so where (1) there is no evidence of a pattern of serious injuries resulting from police officers' delivering knee strikes to combative subjects; and (2) Peterson has presented evidence that over the past five years, there have been only twenty-seven instances of alleged excessive use of force by Fort Worth police officers and of those twenty-seven incidents, only four were substantiated. In light of the thousands of arrests, detentions, and police-citizen encounters that have undoubtedly occurred over the past five years, the Court cannot conclude that Peterson has raised an issue of material fact as to the adequacy of the FWPD' s training on the use of force.

Moreover, Peterson presents no evidence that the City was aware of the potential injuries that could occur as a result of a knee st ike or aware of the potential injuries that could result in the event a knee strike is not properly executed. Coupled with Peterson's failure to show the City's awareness, Peterson fails to show that the City was deliberately indifferent to the need to further train its police officers on the potential injuries that can result from a knee strike.

"For an official to act with deliberate indifference, the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Smith v. Brenoettsy*, 158 F.3d 908, 912 (5th Cir. 1998) . Indeed, deliberate indifference is about intentional and culpable conduct. The test for deliberate indifference requires

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that a municipality have actual knowledge that its training is inadequate and will result in a constitutional violation or that it is so readily obvious that its training is inadequate and will result in a constitutional violation that the municipality must be charged with actual knowledge; and notwithstanding this knowledge, the municipality acted intentionally and consciously in disregard of a probable constitutional violation or risk of serious harm.

To survive summary judgment on a theory of inadequate training, a plaintiff usually must demonstrate a pattern of violations that establishes an obvious need for improved training to prevent an almost certain constitutional violation.

> It may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury . . . To

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> adopt lesser standards of fault and causation would open municipalities to unprecedented liability under [section] 1983.

Harris, 489 U.S. at 390-91. Here, Peterson has failed to establish a genuine issue of material fact as to the City's deliberate indifference to the need to further train its police officers on the dangers associated with executing a knee strike.

e. Failure To Supervise

Finally, Peterson argues that the City is liable because it failed to adequately supervise Officers Horner and Ballard. Peterson contends, "The chain of command repeatedly allows use of excessive force, as well as illegal entries and searches, to go unchecked, while disciplining officers for things such as not filling out reports correctly." (Pl.'s Br. at 22.) But then he claims that "an example of the failure to supervise . . . is the fact that Officer Horner admittedly violated policy by failing to fill out a use of force report after she saw Officer Ballard use a distractionary strike." (*Id.*) Peterson complains that "there was no follow-up with Officer Horner and she was not disciplined or counseled." (*Id.*)

The Court has already addressed Peterson's failure to present a pattern of the excessive use of force by Fort Worth police officers. Peterson has not presented the Court with any evidence that Fort Worth police officers have a pattern of conducting illegal entries or searches either. Furthermore,

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internal affairs fully investigated the allegation that Officer Horner did not properly fill out her report noting Officer Ballard' s use of force. Sergeant M. N. Decker, who conducted the investigation, concluded,

> I have spoken with Officer Horner regarding this incident. She has shown great regret regarding how she handled this call and its subsequent results. She understands how important it is to make accurate entries on worksheets and reports. There is no indication that the officer has had problems of this nature in the past, and there are no indications she is being untruthful. In counsel with Officer Horner, she has been coached to realize the importance of accurate documentation of work product and to seek a supervisor's leadership with complex problems. It is my belief that this is an isolated incident, prompted by less than stellar judgment. There is no evidence that Officer Horner was acting with intent to deceive and she made no attempt to cover her mistakes . . . . At the time of this incident, she was two months into her second year of employment with the department, and only

> [five] months out of training. Additional training and experience will, I believe, prevent this type of situation [from] occurring in the future.

(Pl.'s App. at 345.) The internal-affairs investigation of this incident is strong evidence that the FWPD maintains adequate supervision over the conduct of its officers.

The Fifth Circuit has recognized that "a municipality is subject to [section] 1983 liability when the municipality's policies regarding employee . . . supervision were obviously inadequate, and the resulting lack of . . . supervision was likely to (and actually did) lead to a constitutional violation." *Drake v. City of Halthom* City, 106 Fed. Appx. 897, 899 (5th Cir. 2004) Peterson has failed to meet that burden here. The fact that over the past five years there has been only twenty-seven incidents of alleged excessive use of force and, out of that there are only four substantiated cases, is a strong indication that the FWPD maintains command responsibility over its police officers. Thus, the Court concludes that Peterson has failed to establish a genuine issue of material fact as to the City' s failure to supervise its police force.

3. Texas Tort Claims Act

The City argues that Peterson's claim under the Texas Tort Claims Act must be dismissed because the Act "does not waive immunity for

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intentional torts." (Def.'s Br. at 20.) The City points out that the Act explicitly omits intentional torts from its coverage. See TEX.CIV.PRAC. & REM. CODE § 101.057. Indeed, the Act provides that "a municipality cannot be liable for any claims arising out of assault, battery, false imprisonment, or any other intentional tort . . . ." *Riggs v. City of Pearland*, 177 F.R.D. 395, 405 (S.D. Tex. 1997) (use of mace by police officer not actionable). Peterson has not responded to this argument. After review, the Court agrees with the City and concludes that Peterson's claim under the Texas Tort Claims Act must be dismissed.

III. Conclusion

Accordingly, for the above reasons, the Court GRANTS The City of Fort Worth's summary-judgment motion. All claims against the City are hereby DISMISSED WITH PREJUDICE.

SIGNED February 19, 2008.

s/Terry R. Means
UNITED STATES
DISTRICT JUDGE

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(3)

Supreme Court, U.S.
FILED
JUN 10 2010
OFFICE OF THE CLERK

No. 09-983

In the Supreme Court of the United States

KEVIN SCOTT PETERSON,
Petitioner,

v.

THE CITY OF FORT WORTH, TEXAS,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner resisted a lawful detention and was injured. He seeks to hold the City of Fort Worth liable for his injury pursuant to 42 U.S.C. § 1983 and *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978). The City requires all of its officers to complete a state-accredited 30-week long training academy in which the cadets learn, among other techniques, a knee strike. Petitioner is the first person known to the City ever to have suffered a femoral artery rupture as the result of a knee strike. The questions presented are:

Whether the court of appeals erred in finding that a 27-incident sampling of use of force complaints (all of which resulted in officer discipline, though only four instances of discipline were directly related to the alleged force) over a five-year period of time in the absence of any contextual evidence, such as the size of the department or the number of police-citizen encounters during the same time period, does not constitute evidence of a municipal policy of excessive force sufficient to avoid summary judgment.

Whether the same 27 complaints, given that none of them involved a knee strike rupturing an artery, constitute sufficient evidence of a constitutionally deficient training program.

Whether the City should be held liable under a theory of ratification simply because its *post hoc* internal affairs investigation, in which the City's policymaker did not participate, exonerated the officer in this particular, isolated instance.

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STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on November 17, 2009. The petition for a writ of certiorari was filed on February 16, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(i).

STATEMENT OF THE CASE

On August 13, 2005, Petitioner, Kevin Scott Peterson, and his wife, Jodi Peterson, attended a party at a restaurant in Fort Worth, Texas. The Petersons parked their truck in a private parking lot near the restaurant. Later, at approximately 10:00 p.m., the party moved to a nearby bar. While at the bar, Mr. Peterson drank six to eight beers. His wife drank three or four beers.

Approximately four hours after they arrived at the bar, the Petersons returned to the parking lot and, because they were intoxicated, decided to sleep in the truck rather than drive home. Pet. App. C. Later that morning, at approximately 5:00 a.m., a security guard, who was employed by the owner of the private parking lot, noticed the Petersons inside the vehicle. He knocked on the window and yelled in an attempt to wake them but was unsuccessful. He called the Fort Worth Police Department. Officers Horner and Ballard were dispatched to investigate. *Id.*

The officers approached the Petersons' truck and, in an effort to ensure that the Petersons' were alive and well, tried to wake them by yelling through the window. When they did not respond, Officer Horner opened the door and attempted to wake Mr. Peterson. Mr. Peterson was initially non-responsive, but soon

thereafter kicked at Officer Horner and ultimately struck her on her forearm with his fist. *See Id.* At that point Officer Ballard reached into the vehicle, grabbed Mr. Peterson by his belt and removed him from the vehicle. At some point Officer Ballard placed Peterson against the truck and handcuffed him. As the district court found, "Even when viewed in the light most favorable to Peterson, the evidence shows that Peterson was initially combative and resisted the officers' attempts to briefly detain and question him." Pet. App. UUU. From that point, the evidence is somewhat in dispute, but Peterson claims that while he was handcuffed Officer Ballard delivered a knee strike to his thigh, causing him pain. Pet. App. D.

After a brief investigation, the officers released Mr. Peterson. The Petersons eventually drove home. Kevin Peterson went to the hospital later that day and was diagnosed with a ruptured femoral artery, which he blames on the knee strike. For purposes of the proceedings below, the City agreed to assume that Officer Ballard did, in fact, deliver a knee strike to Peterson. Pet. App. L.

Approximately three months after the incident, Mr. Peterson filed a complaint with the Fort Worth Police Department. In it, Petitioner alleged that Officer Ballard executed a single knee strike, which led to his injury. The Internal Affairs Division initiated an investigation, interviewing the officers, the security guard, and the Petersons. The Police Department requested medical records from Mr. Peterson, but he did not respond to the request. Although Peterson's initial complaint was for excessive force, the Internal Affairs Division itself added two other allegations during the investigation, and

ultimately investigated the officers for three possible violations, including excessive force, falsifying a report, and conducting an illegal search.

During the investigation, Officer Ballard denied ever using a knee strike. Initially, Officer Horner stated that there was a knee strike. She later stated she never saw a knee strike, but assumed one was used because of the belligerent, combative conduct of Mr. Peterson. She stated that the comments she made during the investigation were based on her assumption that a knee strike had occurred.

It is the policy of the Fort Worth Police Department to send a completed internal affairs investigation to the supervisors within the subject officer's chain of command. Each supervisor has an opportunity to review the investigation and make recommendations as to whether he or she believes a violation of the department's General Orders occurred. If any supervisor believes a violation occurred, he or she will make a recommendation as to what discipline should be administered. After the chain-of-command review is completed, the investigation is sent to the Executive Deputy Chief for review and recommendations. If any supervisor has recommended a suspension or termination, the Chief of Police will review the investigation. If there is no such recommendation, the investigation ends with the decision of the Executive Deputy Chief. In this case, there was no recommendation of a suspension or termination, so the Chief of Police did not review the investigation or the comments of the supervisors in the officers' chain of command.

There was never a finding within the Fort Worth Police Department that Peterson was not a threat, that Officer Ballard lied about using the knee strike, that Ballard used excessive force, that Ballard failed to file a Use of Force report, or that Officer Horner falsified a report. The findings by the Police Department on the excessive force and falsifying a police report allegation was "not sustained," meaning that there was insufficient evidence to prove that misconduct took place. The finding on an illegal search was "unfounded," which meant that no misconduct occurred. The district court and a unanimous court of appeals panel also both found that Peterson's detention itself was not unlawful. Pet. App. RRR, J, Z.

Peterson brought the present action against the City of Fort Worth but did not sue the individual officers. Pet. App. Y. The district court granted the City's motion for summary judgment, finding there was no unlawful detention, no excessive force, and, that even if excessive force was used, there was no policy or custom of the City that caused the claimed injury. The court of appeals believed there was sufficient evidence that Officer Ballard used excessive force to prevent summary judgment on that basis, but affirmed, finding Petitioner had failed to produce evidence to impose liability on the City in light of "the standards required by *Monell* and its progeny." Pet. App. Y.

Petitioner is not challenging the lower courts' findings that the detention was lawful. He is claiming only that the City should be held liable for the harm caused by the knee strike. To try to find support for his position, Petitioner has engaged in broad discovery,

acquiring, among other things (as Petitioner explained it in his response to the City's motion for summary judgment), "boxes of internal affairs documents reflecting investigations of complaints of excessive force." Pet. App. EEEE. "After attempting to 'cull them down to a manageable amount of paper,' Peterson states that he 'was still faced with filing an approximately 900-page appendix.' But notwithstanding the numerous internal-affairs documents, Peterson has produced [only] twenty-seven investigations of [alleged] excessive force during the previous five years and 'out of the twenty-seven investigations, excessive force was sustained (found) on approximately four occasions.'" *Id.* (internal citations to Petitioner's brief omitted).

Petitioner presented these 27 claims of excessive force in an editorialized summary chart. *See* Pet. App. II. Of the 27 alleged incidents of prior uses of force submitted by Petitioner, the investigations resulted in findings of wrongdoing in each and every case. In four of the instances, the conclusion was that the officers had used excessive force. In one of those cases, the officer resigned, and in another, the officer was terminated. Other investigations resulted in responses ranging from counseling to official admonishments to suspensions. Petitioner's repeated claims that these 27 alleged instances of force were "clearly excessive" are his own self-serving conclusions. Interestingly, some of the *allegations* listed on Petitioner's summary chart appear to be minor, including claims such as "pulled hair," "they all fell to the ground," and "officer shoved him."

The City of Fort Worth requires each of its potential officers to complete its own 30-week long,

state-accredited, training academy prior to being allowed to work as a police officer. This is true even for officers who have prior law enforcement experience. Among other things, the cadets are trained in use-of-force and self-defense techniques. One of the techniques taught is a knee strike. The officers are also required to review and follow extensive written policies, General Orders, which, among other things, expressly forbid the use of unnecessary or excessive force. Petitioner is not claiming otherwise. Petitioner's own use of force expert, in fact, appears to have concluded that Officer Ballard's conduct violated the department's General Orders.

Other than the claims being made by Petitioner in this case, the City of Fort Worth knows of no other instance in its history in which a knee strike ruptured a person's artery or caused any remotely similar injury, and Petitioner has presented no evidence of any such prior occurrence.

ARGUMENT

On the relevant issue, municipal liability, the opinion below is correct, and there is no reason to review it. It does not conflict with any opinion of this Court or of any other court of appeals. And this case presents a poor vehicle for reviewing any of the numerous issues mentioned by Petitioner because he failed to present sufficient evidence in the district court to survive summary judgment. Of what was presented, much of Petitioner's evidence went only to the legality of the officers' initial interaction with him; yet that issue was resolved by the court of appeals in the City's favor (i.e., the detention was not unlawful), and Petitioner has not challenged that ruling. The

remaining evidence relates to the isolated act of a patrol officer and Petitioner's self-made, editorialized summary of 27 citizen complaints, alleging a variety of other wrongs over the span of some five years, all of which resulted in investigations and the discipline of officers, including retraining, reprimands, suspensions without pay, and termination.

Petitioner's "Pattern" Argument

Petitioner tries to turn an isolated act of a non-policymaker into a case of legal import by arguing that a conflict of authority exists where none does. More specifically, he tries to argue that instances of lower courts applying the same basic law to varying fact scenarios equate to varying opinions of law. The consistently-applied rule of law in issue is this: in some circumstances "*persistent and widespread*" practices within a city may be so "*permanent and well settled*"" as to constitute a municipal custom rising to the level of "policy" for purposes of § 1983 municipal liability. *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 690-91 (1978) (emphasis added). Although the Court in *Monell* expressly left some questions about the scope of municipal liability unanswered, it has since answered the only other question actually presented by this case. That is, can an isolated action of a non-policymaker standing alone create municipal liability under § 1983? "No," is of course the settled answer. *Oklahoma City v. Tuttle*, 471 U.S. 808, 831 (1985). Petitioner argues, however, that two pieces of summary judgment evidence--deposition testimony by the former chief of police and a self-made summary of 27 use of force complaints within the City—make this case something more. They do not.

Statements by the former police chief Mendoza

In his brief, Petitioner repeatedly references the deposition testimony of former police chief Mendoza, apparently arguing that the chief condoned his officers' uses of force following unlawful searches or seizures. *See* Pet. 5, 9, 12. The quoted statements, however, are presented out of context, are misleading, and, most significantly, are completely irrelevant to any issue presented by Petitioner.

In the last paragraph of his "Pattern" argument (Pet. 12), Petitioner states, "Additionally, there is confusion as to the weight to give to the opinions and statements of the policymaker, in this case, Chief Mendoza. Chief Mendoza stated a police officer may legally use force even if a police officer does not have a legal right to enter a private residence and make an arrest." Given the context of the paraphrased deposition examination, Chief Mendoza's actual testimony, although clearly a legal opinion, appears to have been correct.[1] Moreover, arguing that the chief

[1] The testimony Petitioner references was given during a lengthy, confusing examination, apparently designed to test the chief's memory regarding the exact facts of prior, unrelated cases, followed by hypothetical questions, apparently designed to test the chief's understanding of Fourth Amendment law as it applied to the hypothetical. For example, the series of such questions touched on by Petitioner in his petition related to one of the 27 force incidents. Police were called to investigate an alleged theft of cable television. The responding officers followed the actual cable up an apartment's staircase and into an unlocked apartment, where they found the apparent thief hiding under a trash bag in a closet. One of the hypothetical questions then posed by Petitioner's attorney was, "Okay. But if these officers, in

condoned such conduct is inaccurate. With regard to the prior use of force incident being discussed at the time, the chief had disciplined the officer, suspending him for three days without pay, because of the warrantless entry.

Regardless, *even if* Petitioner were able to charge the City with a policy of allowing force to be used following unlawful detentions, the issue is wholly irrelevant in this case. The Court of Appeals flatly held, "Peterson's detention was not unlawful." 588 F.3d at 846. Petitioner has not challenged that holding. Accordingly, the former chief's statements are inapposite to any issue before the Court and add nothing to Petitioner's argument that the Court should grant his petition.

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fact, created the situation that required them to use force, then they could not use force legally correct?" The chief responded, "Again, I tend to disagree with you. . . ." The Chief's legal opinion appears to have been correct. *See, e.g.*, *Dickerson v. McClellan*, 101 F.3d 1151, 1160-61 (6th Cir. 1996) (and cases cited therein) (applying "segmented analysis" in use of force case and noting that the relevant inquiry is "whether the force used to effect that seizure was reasonable in the totality of the circumstances, not whether it was reasonable for the police to create the circumstances.") (quoting, *Carter v. Buscher*, 973 F.2d 1328, 1332-33 (7th Cir. 1992)); *accord Chappell v. City of Cleveland*, 585 F.3d 901, 906 (6th Cir. 2009) (in a case where a 15-year-old boy was shot in his own bedroom, the court, applying the segmented analysis, held, "Because it is the reasonableness of the 'seizure' that is the issue, not the reasonableness of the detectives' conduct in time segments leading up to the seizure, the district court properly held that any fact issues relating to the issuance of the warrant and initial entry into the Chappell residence are immaterial.")

The 27 Incidents

As Petitioner admits, he "did not provide information on the number of Use of Force reports filed or on each citizen complaint filed [during the applicable five-year time span]." Pet. 5, 7. Instead, he presented his own summarized characterizations of 27 *allegations* of excessive force made against Fort Worth police officers on dates ranging from May 25, 2001, to December 5, 2007. The lower courts correctly determined that this information, in a vacuum, is no evidence at all. 588 F.3d at 851-52. The court of appeals stated, "The failure of the evidence is that the plaintiffs have failed to provide context that would show a pattern of establishing municipal liability," *id.*, noting,

> Twenty-seven incidents in four years, with no context as to the overall number of arrests or any comparisons to other cities, is not sufficient evidence of a pattern rising to the level of a policy. The burden of providing a context that would show such a pattern falls on the plaintiff, not on the City, and Peterson has failed to meet that burden. No reasonable jury could conclude based on Peterson's evidence that the City had established a municipal policy of using or condoning excessive force.

588 F.3d at 851, n. 4. If it *were* to be considered in context, Petitioner's evidence would all but vanish.[2]

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[2] According to U.S. Census Bureau estimates for July 1, 2008, Fort Worth is the 17th largest city in the nation, with a population of 703,073 residents, making it larger in population than four

What is notable about the 27 incidents, however, is not the number "27," but rather the number "0." That is how many of the incidents involved a knee strike causing any, much less, a significant, unexpected injury to a suspect. In the only incident cited that did involve a knee strike, an officer was accused by a citizen witness of kneeing a suspect "in the groin, from behind." Petitioner presented no further evidence that the alleged knee strike to the suspect's rear caused any injury, much less one of the magnitude claimed by Petitioner.[3]

If a plaintiff could establish a municipal policy merely by sending a request for production to the city, seeking records of all past allegations of excessive force, and any resulting sampling of use of force allegations could then constitute a policy level

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different American states, Alaska (698,473), North Dakota (646,844), Vermont (621,760), and Wyoming (544,270), as well as the District of Columbia (599,657). *See* http://www.census.gov/popest/cities/tables/SUB-EST2008-01.csv and http://www.census.gov/popest/states/NST-ann-est.html. As the court of appeals noted, the Fort Worth Police Department employs more than 1500 officers. If each officer engaged in only one citizen encounter per day (surely a conservative estimate), over five years and 200 work days per year, the number of police-citizen encounters would be greater than 1.5 million. Petitioner has identified only 27 incidents of *alleged* excessive force over the same period, or in a percentage, no more than 0.0018% of police encounters result even in an allegation of excessive force according to the evidence presented by Petitioner.

[3] There was some discussion in the investigation about whether the knee strike contributed to the suspect hitting his face on the concrete ground upon which he was lying at the time of the struggle. There was no indication that the knee strike caused any injury to the part of the suspect's body to which it was applied.

"pattern," then no city in the country that takes investigating allegations of excessive force seriously could ever avail themselves of the limitations on municipal liability recognized by this Court in *Monell*. Perhaps a case will come along that requires closer scrutiny; perhaps here, for example, if there had been a history in the city of knee strikes inflicting serious or unintended harm, then the questions of how many, and how similar they must be in order to constitute a policy of inflicting excessive force, may have been appropriate inquiries. On the present record, however, there would be no point in entertaining such questions. The quantum and quality of the evidence in this record would not fuel a meaningful debate, and the obvious and only answer would be, "It takes more than this."

No conflict of authority exists between the circuits or between the court of appeals and the Supreme Court

In claiming a split of authority, Petitioner has cited six circuit court cases in addition to the underlying opinion in this case. The other circuits' cases, however, are not on point with the facts of this case or with each other and certainly cannot fairly be read to suggest that the other circuits would have treated the facts of this case any differently than did the court below. In short, there is no conflict.

The court of appeals in this case held that the 27 incidents produced by Petitioner did not constitute evidence of a municipal pattern or custom that was the driving force of the harm for which Petitioner complains. Pet. 8. The court stated that for purposes of examining potential municipal liability in a § 1983

case, a claimed pattern will equate to official policy only "when it is so common and well-settled as to constitute a custom that fairly represents municipal policy." 588 F.3d at 850 (citation omitted). Any such claim of a pattern must reflect some degree of "similarity and specificity," and the claimed pattern must consist of more than "isolated instances." *Id.* This explanation of § 1983 law by the court of appeals is wholly consistent with prior rulings by this Court. *See, e.g., Monell*, 436 U.S. at 691 (describing "customs and usages" as being "persistent and widespread" and "so permanent and well settled as to constitute a 'custom or usage' with the force of law."); *Tuttle*, 471 U.S. at 820-21 (single action by non-policymaker not sufficient); *St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (explaining that "the Court has long recognized that a plaintiff may be able to prove the existence of a widespread practice that . . . is so permanent and well settled as to constitute a custom or usage with the force of law.")

Petitioner first cites *Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir. 1991). Pet. 8. In *Larez*, the plaintiffs were subjected to an illegal, forced search of their home, during which they were roughed up, injured, threatened at gun point with having their heads blown off, and were left with a home in disarray with their belongings scattered and broken. One officer testified that he had witnessed "hundreds" of similar searches (regarding contents not being replaced). *Id.* at 634. The unit responsible for conducting the search was charged with investigating itself. *Id.* at 634-35. Plaintiff's expert had conducted a "comparative study," and, "armed with both many years of practical police experience and empirical data on police department procedures and operations

nationwide and in Los Angeles specifically," concluded that the department failed to properly investigate and discipline officers following citizen complaints. *Id.* at 635, 646. One of the plaintiffs' main complaints was that their home was left in severe disarray following the search. The chief testified that that was not improper conduct. The chief later made statements, which were admitted in trial, that the plaintiffs were lucky they were not more seriously injured. *Id.* at 636. Given the large quantity of unrefuted evidence, the court upheld the jury finding of municipal liability. *Id.* at 647. Citing *Pembaur v. Cincinnati*, 475 U.S. 469, 481 (1986), the court explained that it could find the city liable only if there was evidence from which the jury could have found that a "policy or custom" caused the plaintiff's harm. 946 F.2d at 646. Thus, it is not the law that is in conflict between *Larez* and this case; it is only the facts.

Nothing about the *Larez* holding could guide a court toward deciding the present case any differently than did the court below and nothing about its holding, therefore, could form the basis for a conflict of authority. In trying to argue otherwise, Petitioner is forced to characterize *Larez* quite differently than does even the Ninth Circuit itself. *See, e.g., Dillberg v. County of Kitsap*, 76 Fed. Appx. 792 (9th Cir. 2003) (unpublished) (noting that *Larez* involved multiple instances of known constitutional violations that went unredressed). As at least some indication that *Larez* is not on point as to the facts of this case and does not stand for the propositions Petitioner claims it does, see *MacMillan v. Roddenberry*, No. 5:08-cv-351-Oc-10GRJ, slip op., 2010 WL 668281 (M.D. Fla. Feb. 19, 2010). In *MacMillan*, a case with facts strikingly similar to those in this case, the district court found *Larez* to be

"readily distinguishable." *Id.* at *4. In *MacMillan*, the plaintiff complained of excessive force at the hands of deputies during his arrest. *Id.* at *1. As here, there was no dispute that the department had express policies prohibiting excessive force as well as policies related to internal investigations and discipline matters. *Id.* at *3. Accordingly, the plaintiff was left with the burden to provide evidence of "a widespread custom or practice of excessive force which the sheriff was aware of and permitted to go on." *Id.* at *3. "On this point," the court explained,

> MacMillan has submitted evidence of 15 citizen complaints of excessive force against the Sheriff's Office and Lake County Jail during the five years before and five years after MacMillan's arrest. These complaints . . . are simply not sufficient to establish a material issue of fact concerning a widespread custom or practice of excessive force. Indeed, standing alone, the complaints are meaningless and without any probative value. By the very nature of their activities, any law enforcement agency would be expected to receive some level of complaints from those who are arrested, and in the absence of (1) some statistical or other expert analysis of the number and type of complaints compared to the total number of arrests effected; and/or (2) some substantiation of a portion of the complaints by internal affairs or other comparable verification, the mere fact that some unsubstantiated complaints have been made is not notice of widespread abuses.

Id. The court also noted that of the 15 complaint allegations, "only one involved the use of a taser (the

only aspect of similarity the Court could find between MacMillan's arrest and these other complaints)," and held, "This minimal evidence is insufficient to show 'a widespread practice that . . . is so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Id.* (citing *Griffin v. City of Opa-Locka*, 261 F.3d 1295, 1308 (11th Cir. 2001)).

The result was the same in another remarkably similar case from the Ninth Circuit. *Hocking v. City of Roseville*, unreported, No. Civ. S-06-0316 RRB EFB, 2008 WL 1808250, (E.D. Cal. Apr. 22, 2008). Almost exactly as was done in this case, there, in response to the city's motion for summary judgment, "Plaintiffs presented a chart summarizing each and every citizen complaint alleged against Roseville police officers from January 2002 to November 2007 and the action taken on each complaint ostensibly for the purpose of demonstrating that City police officers engaged in a pattern of abuses for which the Police Chief was or should have been aware of and did nothing to remedy." *Id.* at *5. The district court, citing *Monell*, *Pembaur*, and *Canton v. Harris*, 489 U.S. 378 (1989), *id.* at *3-4, and easily distinguishing *Larez*, *id.* at *6, granted summary judgment. *Id.* at *5-7. Regarding the chart, the court held, "Statistics of unsustained complaints of excessive force and other police misconduct, without any evidence that those complaints had merit, does not suffice to establish municipal liability under § 1983." *Id.* at *5.

Petitioner next cites *Bielevicz v. Dubinon*, 915 F.2d 845 (3rd Cir. 1990). Pet. 9. This case also does not support Petitioner's claim of a circuit split of authority. Petitioner claims the case "addresses uncorrected use of force without reference to specificity or numerosity

. . . ." Pet. 9. The claim is simply not accurate. In *Bielevicz*, the former police chief admitted to a longstanding, well understood, deeply entrenched custom in Pittsburgh of officers using a made-up charge of public intoxication any time they wanted to in order to place anyone they wanted to behind bars. 915 F.2d at 849, 852. There was even an express "four-hour rule," which stated that persons held on such pretextual arrests must be released within four hours. *Id.* Such unjustified public intoxication arrests, pursuant to recognized department custom, were "often used to defuse crowd control problems, to detain people found in areas of notorious drug use, to arrest women suspected of prostitution, and to punish anyone who defiantly quarreled with an officer. In these situations, suspects were arrested and incarcerated, notwithstanding that typically there was not probable cause to believe they were intoxicated." *Id.* at 849. To make matters worse, the only internal investigative procedure in place expressly did not recognize complaints of illegal public intoxication arrests. *Id.*

The court cited *Monell* and ensuing Supreme Court cases in explaining that a municipal custom may rise to the level of a policy only when practices are "so permanent and well settled as to have the force of law." *Id.* at 850. In applying the correct law (the same law applied by the lower courts in this case), the *Bielevicz* court found that the former chief's testimony that the practice of making public intoxication arrests without probable cause (the exact same complaint made by the plaintiff) was so longstanding, widespread, and admittedly known and accepted by the former chief when he was the policymaker, that it

clearly constituted evidence of municipal policy the jury could have considered. *Id.*

Petitioner claims that the case does not reference the "specificity or numerosity" of the prior misconduct; yet the case is about little else but the years-long history within the police department of a rampant practice of the *exact* misconduct for which plaintiff had brought suit. *Bielevicz* has no relation to the facts of this case and does not support Petitioner's claim of a split of authority.[4]

Petitioner further cites *Barron v. Suffolk County Sheriff's Dept.*, 402 F.3d 225 (1st Cir. 2005), for the proposition that "one instance of conduct" is sufficient to establish a custom where there is "evidence from which to infer that it was a longstanding practice." If evidence of a longstanding practice is required, then Petitioner's claim that there is a conflict between the circuits fails. If his claim is that the case does not involve "previous occurrences or identical nature of infraction" (Pet. 10), the claim is simply wrong.

In *Barron*, a prison guard sued after enduring eleven months of continual harassment against him because he blew the whistle on another guard. Not only did he testify that there was a deeply entrenched code of silence within the prison guard ranks, the commander of the prison's day-to-day operations admitted the same thing and agreed that those who

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[4] Incidentally, the language from *Bielevicz* quoted by Petitioner (Pet. 9) does not come from the part of the opinion discussing what is required to establish a municipal policy or custom; it comes from the discussion of the additional necessary element (once a policy has been identified), causation. 915 F.2d at 851.

violate it could face "consequences." 402 F.3d at 237-38. Contrary to Petitioner's characterizations, the case involves many past instances of known conduct identical to that for which the plaintiff brought suit. The court also applied the very same law as is discussed above, noting that in order for a custom to be chargeable to the department, it must be "well settled and widespread." *Id.* at 236-37 (citing *Praprotnik*, 485 U.S. at 130 (plurality opinion)).

Petitioner claims that the Second Circuit's opinion in *Gentile v. County of Suffolk*, 926 F.2d 142 (2d Cir. 1991) supports his position because, he asserts, there was "no requirement of identity of infractions or a specific number of instances." Pet. 10. That case, however, was about the admissibility of a lengthy report prepared by the Temporary Commission of Investigation of the State of New York following its investigation of the Suffolk County District Attorney's Office and Police Department. 926 F.2d at 146. The commission report detailed a history of systematic mismanagement, tolerance and prior ratification of misconduct, and failure to investigate and punish such conduct within the prosecutor's office. *Id.* at 146. The plaintiff claimed wrongful prosecution by the prosecutor, who was the soon-to-be father-in-law of the main police officer-witness's daughter. The plaintiff had gotten into a brawl with the officer one night when both were apparently drunk. As the dissenting justice in that case observed, "bizarre verdicts are the end product of bizarre trials. This case is no exception." *Id.* at 155. It does not appear from the opinion that the defendant County even argued that the report failed to identify a custom; it instead challenged the report's admissibility. The only *Monell*-related issue discussed by the court was causation. *Id.* at 152. The

case does not speak to the Second Circuit's view of any issue relevant to Petitioner's conflict claim.

In *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988), the next case cited by Petitioner, Judge Posner, writing on an issue he found had "little, probably no, practical significance," to the case before the court, 856 F.2d at 995, observed that the City, which had since abandoned the previously customary practice at issue, did "not challenge that it denied criminal defendants due process of law." *Id.* Noting that the acknowledged custom was "department-wide and of longstanding," the jury was allowed to attribute it to the city as policy. *Id.* at 996. The case does not conflict with the law of this Court or of any other circuit.

Finally, *Ware v. Jackson County, Mo.*, arose "out of the rampant sexual misconduct of employees . . . toward female inmates" at the Jackson County, Mississippi, Department of Corrections. 150 F.3d 873, 876 (8th Cir. 1998). Noting that "custom or usage" is demonstrated by: (1) the existence of a continuing, widespread, persistent pattern of unconstitutional misconduct," and mindful of the "high standard" required to overturn a jury verdict, *id.* at 880, the court found the jury could have inferred a pattern chargeable to the county where an inmate of "limited mental capacity" was subjected to abuse, "which spanned five months and involved extortion, deception, and repeated sexual acts," culminating in her rape, where the record was "replete with evidence of repeated sexual misconduct on the part of JCDC personnel." *Id.* at 882. The court also refused to consider the County's challenge to the competency of the evidence because it was not adequately briefed. *Id.* The case does not reflect any circuit view of the law

that would have compelled a different outcome in Petitioner's case.

Given the foregoing, Petitioner's claim that these cases suggests he would have prevailed in any other circuit is unfounded. There is no split of authority and no reason to grant the petition.

Petitioner's "Failure to Train/Supervise" Argument

Petitioner has failed to present evidence that the City of Fort Worth's training or supervision was deficient or that the City consciously disregarded, or was deliberately indifferent concerning, any alleged deficiency. The bulk of Petitioner's "Failure to Train/Supervise" argument (Pet. 12-17) is simply a restatement of his "Pattern" argument. He argues, again relying on the same 27 self-summarized incidents, that the City had a pattern of failing to "train and/or supervise" its officers, regarding something. The exact contours of the argument are vague. Apparently Petitioner is arguing two things. First, Petitioner makes the allegation that the "officers were admittedly not taught [apparently in a general sense] the physical consequences of using force on citizens--the potential harm." Pet. 15. There is no such evidence to support this claim. To the contrary, Petitioner's own expert reports that the police department's General Orders advise that kicking and striking techniques pose a "probability of injury."

Petitioner's need to make such an argument arises from the reality that his only other, potentially more plausible, argument is not supported by any evidence, either. Petitioner's alternative assertion is that "there

was an obvious risk of injury from failing to train on appropriate use of knee strikes and/or the consequences of using a knee strike." Pet. 14. Petitioner did not come forth with even an allegation that officers are not trained in the use of knee strikes; they are. Plaintiff's implied argument is that he was seriously injured (suffering a femoral artery rupture) by a knee strike, and that if the officer had been trained better or differently, he would have known that the knee strike was likely to cause the injury and either not delivered it or delivered it in some other manner. But Petitioner presents not even a single example in the history of the Fort Worth Police Department (or in history, generally) where anyone has ever suffered a ruptured artery (or any remotely similar injury) as a result of a knee strike. There simply is no evidence that the City was in any way "put on notice that a new program [was] called for," or that it continued to adhere "to an approach that [it] kn[ew] or should [have] know[n] ha[d] failed to prevent tortious conduct by employees." *Board of County Com'rs of Bryan County v. Brown*, 520 U.S. 397, 407 (1997) (citing *Canton v. Harris*, 489 U.S. at 390 n. 10).

The only alleged prior knee strike Petitioner mentions involved a suspect resisting being handcuffed. Pet. 14. The officer allegedly kneed the suspect in the buttocks while trying to overcome the resistance. (While admitting that this suspect "tensed up" instead of simply following the officer's commands, Petitioner simultaneously characterizes that as "not resisting." *Id.*) Regardless of the circumstances leading up to its use, however, the knee strike in that single, prior incident did not cause a serious injury to the suspect legs, much less the type of injury alleged by Petitioner. The suspect did receive an injury, but

that injury came as a result of his face striking the concrete on which he was lying. Even if it were assumed that the knee strike caused the suspect to hit his face on the ground, nothing about that incident could possibly be said to have foretold of a future knee strike causing a femoral artery rupture.

No conflict of authority exists between the circuits or between the court of appeals and the Supreme Court

There is no conflict of authority between the Fifth Circuit and this Court or any other court of appeals on the issue of failure to train. Petitioner claims that the court below disregarded one manner of proving a failure to train claim. Pet. 13. It did not. Petitioner weaves a fairly complex tale of how the Fifth Circuit got it wrong, saying the court of appeals "combined the two prongs set out by this Court in *[Canton v. Harris]* and created a hybrid standard for a failure to train claim." Pet. 14. Petitioner supports this by claiming the court of appeals did something it did not do:

> Instead of analyzing whether Mr. Peterson had presented evidence that either there was a failure to train for situations that present an obvious potential for constitutional violation or a failure to train after learning of repeated violations, the court required both types of evidence that there was an obvious risk of injury from that specific conduct and a pattern of similar incidents causing injury.

Id. (emphasis in original). This assertion is the foundation of Petitioner's entire argument that there is a split of authority on this issue (*see* Pet. 13-17); yet

this assertion is not supported by the court of appeals' opinion.

In its opinion, the court of appeals plainly and unambiguously states, "[U]nder certain circumstances, § 1983 liability can attach for a single decision not to train an individual officer even where there has been no pattern of previous constitutional violations." 588 F.3d at 849 (quoting *Brown v. Bryan Co., Okla.*, 219 F.3d 450, 459 (5th Cir.2000)). In the quoted passage from the opinion in *Brown*, the Fifth Circuit is citing *Canton v. Harris* for the exact proposition Petitioner claims has been ignored. 219 F.3d at 459. The court does not misstate the law. It simply concludes that "Peterson has presented no material fact question to show that it should have been obvious to the policymakers that the risk of serious injury was a 'highly predictable consequence' of the failure to train." 588 F.3d at 849.[5]

There is no reason to analyze the cases from other circuits cited by Petitioner because, as explained above, Petitioner's basis to claim a conflict of authority is fatally flawed. That is, he incorrectly concludes, "[T]he Fifth Circuit finds that there *must be evidence that the violation had occurred previously*" (Pet. 16 (emphasis added)), while, again, what the court actually says is "§ 1983 liability can attach for a single decision not to train an individual officer *even where*

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[5] Petitioner's attempt to rely on an argument that, even in the absence of a pattern of prior incidents, the City should have foreseen the need for more or different training with regard to knee strikes is specious because Petitioner never once made that argument to the district court in response to the City's motion for summary judgment. *See* Pet. App. MMMM.

there has been no pattern of previous constitutional violations." 588 F.3d at 849 (emphasis added).

Accordingly, the court of appeals applied the correct law correctly, and the petition should be denied.

Petitioner's "Ratification" Argument

Citing *Praprotnik* and *Canton v. Harris*, Petitioner argues that the Court should grant his petition on the issue of ratification. Yet this case simply does not involve facts giving rise to a ratification claim. Under any arguable formulation of a ratification claim, as Petitioner acknowledges, a *policymaker* must approve a subordinate's unlawful conduct and the basis for it. Pet. 18, citing *Praprotnik*, 485 U.S. at 127 and *Bouman v. Block*, 940 F.2d 1211, 1231 (9th Cir.), cert. denied, 502 U.S. 1005 (1991). The same requirement is articulated in the opinion below. 588 F.3d at 848. Here, however, no *policymaker* ever approved (certainly not in any official sense) of the conduct alleged by Petitioner.

Petitioner *states* that he "has provided evidence of a policymaker that approved of the subordinate's conduct and the basis for it." Pet. 18. But in actuality, all Petitioner can point to is an internal affairs investigation that the policymaker, then-Chief Mendoza, did *not* review. This particular internal affairs investigation never rose any higher in the chain of command than the Deputy Chief. Accordingly, in this case in which the parties agree that Chief Mendoza was the only relevant policymaker (Pet. 3, 4), the Deputy Chief who made the decision to approve the officer's chain of command's recommended finding that no excessive force violation had occurred could not

have ratified the subordinate officer's conduct in any manner that would give rise to municipal liability.

Despite this, Petitioner claims, "In this case there was an investigation disclosing . . . that the entire chain of command condoned the conduct and that the policymaker himself found that both officers followed the city's policies and procedures." Pet. 20. Although this statement at first appears difficult to reconcile with the facts discussed above (i.e., the Chief was not involved in the investigation or its review), Petitioner, through the use of carefully-chosen words, is not being entirely untruthful. What Petitioner actually appears to be claiming is that the Chief allegedly "ratified" the officer's conduct *through his deposition testimony in this lawsuit*. Petitioner has directed the Court to no authority that holds a municipality may be found liable under § 1983 because its policymaker disagreed under deposition examination that a subordinate's conduct was unconstitutional. Such evidence cannot possibly satisfy Petitioner's burden to demonstrate that deliberate conduct by the City was the 'moving force' behind the alleged injury when the alleged injury had occurred years earlier. *See Board of County Com'rs of Bryan County v. Brown*, 520 U.S. 397, 404 (1997).

Even if the Chief had reviewed the internal affairs investigation, the result would be no different. Petitioner points to the Sixth and Ninth Circuits in support of his claim that there is a conflict of authority. At best, there is a conflict of semantics, but when courts are faced with facts similar to this case, the results are the same in those circuits as it was in the court below. *See* (from the 6th Circuit): *Swann v. City of Columbus*, unreported, No. 2:04-cv-578, 2007

WL 1831131 (S.D. Ohio June 25, 2007). There the plaintiff claimed that during his arrest he was unnecessarily punched, kicked, and smothered unconscious. He further claimed that following the incident, the officers had submitted fraudulent reports. Because the officers were not disciplined he claimed that the City of Columbus had ratified the officers' conduct. The court easily dispensed with the claim, noting, "[S]ubsequent ratification of past wrongdoing cannot logically be the moving force behind the alleged constitutional violation." *Id.* at *3 (citing *Tompkins v. Frost*, 655 F. Supp. 468, 472 (E.D. Mich. 1987) for its holding that "wrongful conduct after an injury cannot be the proximate cause of the same injury").

Likewise, in *Tomazic v. City of Cleveland*, unreported, No. 1:04cv2252, 2006 WL 2661295 (N.D. Ohio Sept. 14, 2006), an officer shot and killed a fleeing misdemeanant. Because the officer was not disciplined by the department, the plaintiff claimed the City of Cleveland should be held liable on a theory of ratification. The court disagreed, holding, "Ratification of Officer Jopek's acts after the fact, even if it had happened, could not have been a direct cause of the shooting when it occurred. Absent some showing that the City had a past history of ratifying the use of deadly force in situations similar to that which occurred in this case, and that Officer Jopek relied on this policy when making his decision to shoot Mr. Strnad, there cannot be the necessary causal link to establish the City's liability." *Id.* at *5.

From the Ninth Circuit, the court in *Haugen v. Brosseau*, 351 F.3d 372 (9th Cir. 2003), rev'd on other ground, 543 U.S. 194 (2004), acknowledged the existence of ratification as a potential basis for

municipal liability but held that "there are no facts in the record that suggest that the single failure to discipline Haugen rises to the level of such a ratification." *Id.* at 393 (citing *Santiago v. Fenton*, 891 F.2d 373, 382 (1st Cir. 1989) for its refusal to hold that the "failure of a police department to discipline in a specific instance is an adequate basis for municipal liability under Monell") *See also Peschel v. City of Missoula*, 686 F. Supp. 2d 1092, 1102 (D. Mont. 2009) (explaining Ninth Circuit law regarding ratification and emphasizing its limits, noting, "Importantly, the circumstances of the ratification must also demonstrate that the supervisor had previously set in motion acts of others which caused the others to inflict a constitutional injury.").

Finally, *Siwiec v. Thompson*, unreported, No. CV-02-454-ST, CV 02-460-ST, 2004 WL 2480516 (D. Or. Nov. 3, 2004), was a case factually very similar to this one in that the plaintiff attempted to hold the offending officer's employer liable because an investigation had allegedly "ratified" the officer's unconstitutional conduct. Although without using the exact words Petitioner highlights, "extreme factual situations," after reviewing ratification law, the court did observe, "Cases recognizing post-event ratification have generally presented very clear instances of abuse and gross recklessness." *Id.* at *22. Then, applying Ninth Circuit law, the court held, "[the plaintiff] has shown that [Sheriff] Spinden concurred in the decision of an Internal Affairs Investigation team regarding a series of complaints regarding a single police/citizen encounter. That is insufficient to proceed against Washington County on a ratification theory." *Id.* at *24.

Accordingly, had Petitioner's case arisen in the Sixth or Ninth circuits, the result would have been the same as it was here. In fact, the one-time, *post hoc*, approval of the isolated act of Office Ballard would not have given rise to municipal liability in any court, as it could not have caused the harm for which Petitioner complains. For these reasons, Petitioner has failed to present sufficient evidence to support a ratification claim or to demonstrate any conflict of authority, and the petition should be denied.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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June 10, 2010